(23,161)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 230.

THE SANTA FE CENTRAL RAILWAY COMPANY AND W. S. HOPEWELL AND THOMAS P. GABLE, ITS SURETIES, PLAINTIFFS IN ERROR,

vs.

HARRY SLOCUM FRIDAY, BY JOHN H. FRIDAY, HIS NEXT FRIEND.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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a THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, wherein The Santa Fe Central Railway Company was appellant and W. S. Hopewell, and Thomas P. Gable, its sureties on the supersedeas Bond to supersede said judgment, and Harry Slocum Friday by John H. Friday, his next friend, was appellee, a manifest error hath happened, to the great damage of said appellant and its sureties on the supersedeas bond, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date hereof, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause, further to be done therein, to correct that error, what of right, and according to the law and custom of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice, of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico, this the 2nd day of January, A. D., 1911.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

b STATE OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the State of New Mexico, do hereby make return to the within writ of error by transmitting herewith a complete transcript of the transcript and proceedings in the cause entitled therein, in pursuance to the command of the said writ of error hereto attached.

Witness my hand and seal of the Supreme Court of New Mexico, this the 15th day of March, A. D., 1912.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

6 THE UNITED STATES OF AMERICA, ss:

To Harry Slocum Friday, by John H. Friday, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, wherein The Santa Fe Central Railway Company was appellant and you were appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico, this the 2nd day of January, A. D., 1912.

[Seal Supreme Court, Territory of New Mexico.]

WILLIAM H. POPE,
Chief Justice Supreme Court of New Mexico.

I acknowledge service of a copy of the above writ, or citation, on me at my office in the city of Santa Fe, this the 4th day of January, 1912.

G. W. PRICHARD,
Att'y for Harry Slocum Friday.

1 Be it remembered, that heretofore, on towit, *on* the ninth day of January, A. *A.*, 1909, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a transcript of record in a certain cause entitled Harry Slocum Friday, by John H. Friday, his next friend, appellee vs. The Santa Fe Central Railway, Company, appellant and numbered 1262, which said transcript of record was and is in the following words and figures towit:

2 UNITED STATES OF AMERICA,
Territory of New Mexico:

In the First Judicial District Court Sitting for the Trial of Causes Arising under the Constitution and Laws of the United States in the First Judicial District in said Territory.

HARRY SLOCUM FRIDAY, by JOHN H. FRIDAY, His Next Friend, Plaintiff,

vs.

THE SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

Præcipe for Appeal.

Francis C. Wilson, Esqr., Clerk of said Court, Santa Fe, New Mexico:

Please make and certify two complete copies of your records and the pleadings in your office in the above entitled case for the Supreme

Court of the Territory of New Mexico for an appeal sued out by the above named defendant from the decisions and judgments and orders rendered by said court in said case, as follows, to-wit:

1. Complaint, summons and return of sheriff or marshal.
2. Order allowing defendant to withdraw first demurrer.
3. Second demurrer filed by defendant.
4. Order overruling second demurrer and allowing defendant to plead.
5. First amended answer.
6. Demurrer and reply of plaintiff.
7. Order allowing defendant to withdraw answer and file demurrer.
8. Demurrer of defendant.

3 9. Order overruling defendant's second demurrer.

10. Order allowing defendant to refile answer, and striking out certain parts of answer and allowing plaintiff to file amended reply.
11. Amended reply.
12. Trial, verdict and special findings of jury.
13. Instructions given by the court, asked, given and refused on both sides.
14. Motion for new trial, and order denying same, and exceptions.
15. Motion in arrest of judgment, and order denying same, and exceptions.
16. Judgment; notice of an appeal and order granting same and fixing bond.
17. Appeal Bond.
18. The Præcipe for record.

(Signed) CHAS. F. EASLEY,
(Signed) N. B. LAUGHLIN,
Santa Fe, New Mexico,
Attorneys for Defendant.

Endorsement: No. 896. United States Court, First Judicial District, Territory of New Mexico. Harry Slocum Friday, by John H. Friday, next friend, vs. The Santa Fe Central Railway Company. Præcipe for Appeal. Filed in Clerk's Office, First Judicial District, Dec. 21, 1908. Francis C. Wilson, Clerk. C. F. Easley, N. B. Laughlin, Santa Fe, New Mexico, Attorneys for Defendant.

4 Be it remembered that on the 10th day of April, A. D. 1907, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, a Complaint which said Complaint is in words and figures as follows, to-wit:

Complaint.

In the District Court of the First Judicial District of the Territory of New Mexico, Sitting for the Trial of Causes Arising under the Laws of the United States.

No. 896.

HARRY SLOCUM FRIDAY, by His Next Friend, JOHN H. FRIDAY, Plaintiff,

vs.

THE SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

The plaintiff, Harry Slocum Friday, who is under the age of twenty-one years, by John H. Friday, his next friend, for cause of action herein complains and alleges:

1. That the defendant is and was on the first day of December, A. D. 1906, a corporation organized under the laws of the Territory of New Mexico, and is and was on said day, the owner and in possession and control of a certain line of railway, and is and was operating said railway and engaged in trade and commerce therewith as a common carrier from the city of Santa Fe, in the county of Santa Fe, to the town of Torrance in said Territory.

2. That the said plaintiff on the day and year aforesaid, was in the employ of the defendant for hire and reward as a brakeman under contract between the plaintiff and defendant, and that it then and there became the duty of the defendant to procure good and safe cars, machinery and appliances for the proper conduct of its business as such common carrier.

3. That the said defendant conducted itself so carelessly, negligently and unskillfully that by and through the carelessness, negligence and the fault of its officers and agents, it provided and suffered to be used an unsafe, defective and insufficient car, brake-wheel and brake-staff on said line of railway.

4. That for want of due care and attention to its duties in that behalf, on the said first day of December, A. D., 1906, while plaintiff was in the employ of defendant, as aforesaid, and in the actual discharge of his duties as such brakeman in the handling of said defective and insufficient car, brake-wheel and brake-staff on defendant's train of cars between the stations of William's Spur and Clark on said railway in said Territory, by the loosening and slipping of said defective brake-wheel and defective brake-staff which the plaintiff then and there handled in applying the brake to said car while said car and the train to which the same was attached was in motion, due to the carelessness and negligence of the defendant, was thrown from said train to the ground, by means whereof he was greatly injured and his left arm shattered, crushed and broken below the elbow, necessitating the amputation thereof, and his upper face and lip cut, lacerated and bruised from the right nostril extending about four inches across his left cheek, greatly injuring and dis-

figuring his face, and was otherwise greatly injured, cut and wounded, insomuch that plaintiff became sick and helpless for a long space of time and is yet sick and in a large degree helpless from the injuries so received, and was compelled to and did necessarily lay out large sums of money for surgical and medical attendance and nursing, and was and is prevented from performing manual labor and attending to his business and has received injuries for his natural life and damages in the sum of Fifty Thousand Dollars, ($50,000.00.)

6 Plaintiff, by John H. Friday, his next friend, therefore prays judgment for damages sustained by him in the premises in the sum of Fifty Thousand Dollars ($50,000.00) and for his cost in and about this suit expended.

(Signed) GEO. W. PRICHARD, *Attorney.*

TERRITORY OF NEW MEXICO,
County of Santa Fe:

George W. Prichard, being duly sworn, deposes and says that he is the attorney of John H. Friday, who brings this suit as the next friend of Harry Slocum Friday, that he has read the foregoing complaint and knows the contents thereof, that the same is true to the best of his knowledge, except as to the matter stated on information, and as to such matters he believes them to be true and this affidavit is made by him as the attorney herein on the account of the absence of the said John H. Friday from the Territory of New Mexico.

(Signed) G. W. PRICHARD.

Sworn and subscribed to before me this 10th day of April, A. D. 1907.

(Signed) A. M. BERGERE, *Clerk.*

Endorsement: No. 896. District Court of First Judicial District, Territory of New Mexico. Harry Slocum Friday, by his next friend, John H. Friday, Pltff. vs. The Santa Fe Central Rail-

7 way Company, Deft. Complaint. Filed in my office Apr. 10, 1907. A. M. Bergere, Clerk. George W. Prichard, Santa Fe, N. M. Attorney for Plaintiff.

Be it further remembered that on the 10th day of April A. D. 1907, there was issued by the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, a Summons, which was served on the 19th day of April, 1907, and filed in the office of the said Clerk, on the 1st day of May, A. D. 1907, which said summons and the return of service of the Sheriff of Santa Fe County are in words and figures as follows, to-wit:

Summons.

UNITED STATES OF AMERICA,
Territory of New Mexico:

To the Santa Fe Central Railway Co., Defendant, Greeting:

You are hereby commanded to be and appear before the First Judicial District Court of the Territory of New Mexico, sitting within and for the 1st Judicial District, that being the District in which the complaint herein is filed, within twenty days after the service of this Summons, if defendant is served in this Judicial District, otherwise within thirty days after service, then and there to answer the complaint of Harry Slocum Friday, by his next friend John H. Friday in an action of damages. You are notified that unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint together with the costs of suit.

8 Witness the Hon. John R. McFie, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the First Judicial District Court thereof, and the seal of the said District Court, this 10th day of April, A. D. 1907.

[SEAL.] (Signed) A. M. BERGERE, *Clerk.*

(*Back of Summons.*)

A statement of the nature of the action in general terms, viz: Copy of complaint attached to copy of summons.

A. M. BERGERE, *Clerk,*

TERRITORY OF NEW MEXICO,
County of Santa Fe:

R. L. Baca being duly sworn says that he is a deputy sheriff duly appointed by C. C. Closson, sheriff for and acting within the county of Santa Fe, in said Territory; that I received the within summons for service on the 15 day of April, 1907, and on said day I proceeded to serve the same, and made service as follows: I delivered in person to F. H. McBride the station agent at the city of Santa Fe, of the Santa Fe Central Railway Co. a copy of this summons together with a copy of the complaint in this action said complaint being attached to said copy of summons.

(Signed) R. L. BACA,
Deputy Sheriff.

Sworn and subscribed before me this 15th day of April, 1907.

[SEAL.] (Signed) GEO. W. ARMIJO, *P. C. & R.*

9 Endorsement: No. 896. United States District Court, First Judicial District. Harry Slocum Friday, by his next friend, John H. Friday, vs. The Santa Fe Central Railway Company.

Summons. Name and Address of Plaintiff's Attorney. G. W. Prichard, Santa Fe, N. M. Filed in my office May 1, 1907. A. M. Bergere, Clerk.

Be it further remembered that on August 14, A. D. 1907, there was filed and entered of record in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico an Order Allowing Defendant to Withdraw First Demurrer, which said Order is in words and figures as follows, to-wit:

Order Allowing Defendant to Withdraw First Demurrer, etc.

No. 896.

HARRY S. FRIDAY, by His Next Friend, JOHN H. FRIDAY, Plaintiff,
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

This cause having come on to be heard by consent of counsel of both parties in open court, it is agreed that the demurrer heretofore filed by the defendant herein, on May 3, 1907, may be withdrawn, and the demurrer this day presented to the court by the defendant filed in lieu thereof, and it is so ordered.

(Signed) JOHN R. McFIE, *Judge, etc.*

10 Endorsement: No. 896. In the United States Court, First Judicial District. Harry S. Friday, by his next friend, vs. The Santa Fe Central Railway Co. Order. Filed in my office Aug. 14, 1907. F. C. Wilson, Clerk.

Be it further remembered that on the 14th day of August, A. D. 1907, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, a Demurrer, which said Demurrer is in words and figures as follows, to-wit:

Demurrer.

UNITED STATES OF AMERICA,
Territory of New Mexico, County of Santa Fe:

In the First Judicial District Court, Sitting for the Trial of Causes Arising under the Constitution and Laws of the United States.

No. 896.

HARRY S. FRIDAY, by His Next Friend, JOHN H. FRIDAY, Plaintiff,
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

Now comes the above named defendant, by its attorneys of record, and interposes its demurrer, and for grounds of such demurrer shows to the court here:

1. Because the Act of Congress, approved June 11, 1906, under which this action is brought, is not a regulation of commerce
11 as defined by the Constitution of the United States, and is therefore unconstitutional and void.

2. Because said Act of Congress is unconstitutional and void with respect to the action at bar, because it draws no distinction between interstate commerce and intrastate commerce, and if it is a regulation at all, it attempts to and does regulate intrastate as well as interstate commerce, and is for that reason void.

3. Because said Act of Congress is unconstitutional and void in this, that it contravenes the Fifth Amendment to the Constitution of the United States, which provides, among other things that "no person shall * * * be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

4. Because said Act of Congress is unconstitutional and void in this, that it is in contravention of the Seventh Amendment of the Constitution of the United States, which provides among other things that "in suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law," and the defendant in the action at bar is entitled to a trial by a jury of the visne.

5. Because the court is without jurisdiction to hear and determine the action at bar in this, that the said John H. Friday, the next friend of the plaintiff, is a resident of the State of Nebraska, and that this court sitting for the trial of causes arising under the Constitution and laws of the United States, has not any jurisdiction to try and determine causes arising between a resident of a State and a resident of this Territory.

12 6. That for divers and sundry other insufficiencies in plaintiff's complaint, the said defendant corporation prays the decision of this Honorable Court as to whether it shall be required to make any answer to plaintiff's complaint:

Wherefore, defendant, the Santa Fe Central Railway Company, Corporation, prays to be hence dismissed with its costs in this behalf sustained.

(Signed) N. B. LAUGHLIN,
(Signed) CHAS. F. EASLEY,
Attorneys for Defendant, Santa Fe, N. M.

Endorsement: No. 896. United States Court, First Judicial District. Harry S. Friday, by John H. Friday, his next friend vs. The Santa Fe Central Railway Company. Demurrer. Filed in my office, Aug. 14, 1907. F. C. Wilson, Clerk. C. F. Easley, N. B. Laughlin, Attorneys for Defendant.

Be it further remembered that on Sept. 6, A. D. 1907, there was entered of record in the office of the Clerk of the District Court of

the First Judicial District of the Territory of New Mexico, an Order, which said Order is in words and figures as follows, to wit:

13 *Order Overruling 2nd Demurrer and Allowing Defendant to Plead.*

In the District Court of the First Judicial District of the Territory of New Mexico.

No. 896.

HARRY SLOCUM FRIDAY, ETC.,
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY.

This cause coming on to be heard upon the second demurrer filed by the defendant in the above entitled cause, the parties thereto appear by their attorneys and the Court hears arguments of counsel for and against said demurrer and being fully advised in the premises.

It is ordered by the court that the demurrer be and it hereby is overruled, and that the defendant be given until September 13th, 1907 to plead to the complaint, to which order of the Court, the defendant then and there excepted.

(Signed) JOHN R. McFIE,
Associate Justice, etc.

Be it further remembered that on the 22nd day of October, A. D. 1907, there was filed in the office of the Clerk of the District Court of the First Judicial District, a First Amended Answer, which said First Amended Answer is in words and figures as follows, to-wit:

First Amended Answer.

UNITED STATES OF AMERICA,
Territory of New Mexico:

In the District Court of the First Judicial District, Sitting for the Trial of Causes Arising under the Constitution and Laws of the United States.

14 No. 896.

HARRY SLOCUM FRIDAY, by His Next Friend, JOHN H. FRIDAY,
Plaintiff,
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

Comes now the above named defendant, and with leave of the Court first had and obtained, by its attorneys, makes this, its amended answer, and without waiving any rights raised and set

forth in its demurrer heretofore filed herein as to the question of the jurisdiction of this Court over the persons and subject-matters to try and determine the same, and expressly saving and reserving all rights to objections and exceptions to the decision of the Court in overruling its said demurrer, for amended answer to the complaint of the said plaintiff, says:

1. That it admits that it is a corporation, as plaintiff has alleged and set forth in his complaint, and is engaged in trade and commerce as a common carrier from the City of Santa Fe, in the County of Santa Fe, to the town of Torrance in the County of Torrance in the Territory of New Mexico, as alleged and set forth in paragraph 1 in plaintiff's complaint.

2. That for answer to the allegations set forth in paragraph 2 in plaintiff's complaint, this defendant admits that the said plaintiff, Harry Slocum Friday, was at the time therein stated employed by the defendant corporation as a brakeman for hire upon its railroad trains between the city of Santa Fe and the town of Torrance, as aforesaid.

3. That for answer to paragraph 3 of plaintiff's complaint, this defendant denies each and every allegation therein contained, and specifically denies that it conducted itself carelessly, negligently or unskillfully, or in any wise improperly through or by any
15 carelessness or negligence or fault of its officers or agents, or otherwise provided or supplied to be used an unsafe or defective or insufficient car or brakewheel or brakestaff upon its said line of railway or railroad cars at the time therein stated, or at any other time; and this defendant corporation alleges the fact to be that it was the duty of the said plaintiff Harry Slocum Friday, to examine and report any and all defects or unsafe or insufficient conditions of said car or cars, brakewheels or brakestaff on or about said train or trains upon the line of the said defendant's said line of railroad at that time, [and at all other times while he was so employed], as aforesaid, and that if any defects or insufficiencies existed in or about said car or cars, brakewheel or brakestaff then in use by the said defendant, and then being used by the said plaintiff in his capacity as brakeman, it was his duty [to know and] to report the same to the proper authority managing and operating said railway line, as aforesaid, and if any such defects or unsafe — or insufficiencies did exist, [the said plaintiff well knew of them], to report the same, if any did exist, he failed and neglected so to do, and in such failure he was guilty of contributory negligence.

4. That for answer to paragraph 4 of plaintiff's complaint, the said defendant corporation admits, on information and belief, that the said plaintiff, Harry Slocum Friday, did sustain some personal injuries substantially as alleged therein, but this defendant corporation specifically denies that he sustained said personal injuries through or by any want of due care or attention to its duties as a common carrier or otherwise, and specifically denies, on information and belief, that said plaintiff sustained such personal injuries by reason of the loosening or slipping of any defective brake-
16 wheel, or of any defective brakestaff which plaintiff was then and there handling in applying the brake to said car, or in

any other manner; and specifically denies, on information and belief, that said plaintiff sustained personal injuries by reason of, or due to any carelessness or negligence on the part of the defendant corporation, or of any of its agents, servants or employees, and alleges the fact to be that he, the said plaintiff did sustain said personal injuries by reason of his own acts of carelessness or negligence in his failure and neglect to attend to his duties in a proper or skillful manner as such brakeman, as aforesaid; and further alleges the fact to be that when said personal injuries occurred he was acting outside of the line of his duties as brakeman, as aforesaid, and was not called upon or authorized to perform any of the duties which he was attempting to perform at the time the said alleged accident occurred; and this defendant corporation specifically denies that the said plaintiff, Harry Slocum Friday, sustained personal injuries, or any personal injuries to his damage in the sum of $50,000 or any other sum, through or by reason of any defective brakewheel or defective brakestaff in use by said defendant corporation on or about its said cars and railway line, and then and there, or at any other time, used by said plaintiff in his capacity as brakeman, as aforesaid.

5. And for a further answer and defense, this defendant corporation specifically denies each and every allegation in plaintiff's complaint contained, not hereinbefore specifically admitted, controverted or denied:

Wherefore, this defendant corporation, the Santa Fe Central Railway Company, having fully answered the complaint of the
17 plaintiff, Harry Slocum Friday, prays to be hence dismissed with its costs in this behalf sustained.

(Signed) N. B. LAUGHLIN,
(Signed) CHAS. F. EASLEY,
Santa Fe, N. M.,
Attorneys for Defendant.

TERRITORY OF NEW MEXICO,
County of Santa Fe:

On this 19th of October, 1907, personally appeared before me, Chas. F. Easley, who after being first duly sworn, declared on oath that he is the attorney of record for the said defendant corporation; that he has read the foregoing answer and understands the contents thereof, and that the same are true of his own knowledge except as to the matters and things therein stated on information and belief, and as to those matters, he believes them to be true.

(Signed) CHAS. F. EASLEY.

Subscribed and sworn to before me this 19th day of October, 1907.

(Signed) N. B. LAUGHLIN,
Notary Public.

Endorsement: No. 896. Civil. United States of America, First Judicial District Court, Territory of New Mexico. Harry Slocum Friday, by his next friend, John H. Friday, vs. The Santa Fe

Central Railway Company. First Amended Answer. Filed
18 in my office Oct. 22, 1907. F. C. Wilson, Clerk, By E. W. Marsh, Deputy. N. B. Laughlin, Chas. F. Easley, Santa Fe, New Mexico, Attorneys for Defendant. Re-Filed in my office September 15, 1908. F. C. Wilson, Clerk.

Be it further remembered that on the 19th day of September, A. D. 1907, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, a Demurrer and Reply, which said Demurrer and Reply is in words and figures as follows, to-wit:

Demurrer and Reply.

UNITED STATES OF AMERICA,
Territory of New Mexico:

In the District Court of the First Judicial District, Territory of New Mexico, Sitting for the Trial of Causes Arising under the Laws of the United States.

No. 896.

HARRY SLOCUM FRIDAY, by His Next Friend, JOHN H. FRIDAY, Plaintiff,
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

Now comes the plaintiff, by his attorney, and demurs to that part of paragraph 3 of defendant's answer, which reads as follows:

"And this defendant corporation alleges the fact to be that
19 it was the duty of the said plaintiff, Harry Slocum Friday, to examine and report any and all defects or unsafe or insufficient conditions of said car or cars, brakewheels or brakestaff on or about said train or trains upon the line of the said defendant's said line of railroad at that time, and at all other times while he was so employed, as aforesaid, and that if any defects or insufficiencies existed in or about said car or cars, brakewheel or brakestaff then in use by the said defendant, and then being used by the said plaintiff in his capacity as brakeman, it was his duty to know and to report the same to the proper authority managing and operating said railway line, as aforesaid, and if any such defects or unsafe or insufficiencies did exist, the said plaintiff well knew of them, but to report the same, if any did exist, he failed and neglected so to do, and in such failure he was guilty of contributory negligence."

And for grounds of demurrer plaintiff alleges:

1. That the matter above alleged does not constitute a cause of defense.

2. That the matter above alleged is not a statement of fact, but is argumentative and the conclusion of the pleader.

3. That the matter above alleged is neither a denial of facts stated

in the complaint, or a statement of new matter, and is indefinite and evasive.

(Signed) G. W. PRICHARD,
Attorney for Plaintiff.

And for reply to the new matter contained in paragraph 4 of said answer, plaintiff denies that he sustained the personal injuries complained of, by reason of his own acts of carelessness or negligence, or in his failure and neglect to attend to his duties in a proper manner as such brakeman. And he further denies that when said personal injuries were incurred he was acting outside of the
20 line of his duties as such brakeman, or that he was not called upon or authorized to perform any of the duties he was attempting to perform at the time said injuries occurred.

The plaintiff having replied to the new matter contained in said answer, or so much thereof as he deems material to reply to, prays judgment in the premises as already prayed in his complaint.

(Signed) G. W. PRICHARD,
Attorney for Plaintiff.

TERRITORY OF NEW MEXICO,
County of Santa Fe:

On this 10th day of December, 1907, personally appeared before me George W. Prichard, who being first duly sworn, says that he is the attorney of record of the said plaintiff; that he has read the foregoing reply and understands the contents thereof; that the same is true to the best of his knowledge, except as to matters therein stated on information, and as to such matters believes them to be true.

(Signed) G. W. PRICHARD.

Subscribed and sworn to before me this 10th day of December, 1907.

[SEAL.] (Signed) J. P. VICTORY,
Notary Public.

Endorsement: No. 896. In the District Court of the First Judicial District, Territory of New Mexico, Sitting for the Trial of Causes Arising Under the Laws of the United States. Henry Slocum Friday vs. The Santa Fe Central Railway Company. Demurrer
21 and reply. Filed in Clerk's office First Judicial District, Dec. 11, 1907. Francis C. Wilson, Clerk. Geo. W. Prichard, Santa Fe, N. M. Attorney for Plaintiff. Re-filed in my office Sept. 15, 1908. F. C. Wilson, Clerk.

Be it remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico begun and held on the first Monday of September, A. D. 1908, and on the eighth day of said term, the same being Tuesday, the 15th day of September, A. D. 1908, the following among other proceedings were had and entered of record, to-wit:

Order Allowing Defendant to Withdraw Answer, etc.

No. 896, Civil.

HARRY SLOCUM FRIDAY
vs.
SANTA FE CENTRAL RAILWAY COMPANY.

This cause having come on to be heard, on the motion of the defendant for leave to withdraw its answer for the purpose of filing and arguing a demurrer interposed by it, and the court having heard arguments, and being sufficiently advised in the premises, sustains said motion, and leave is granted to the defendant to withdraw its answer and file its demurrer, to which ruling the plaintiff then and there excepted.

And the court having heard arguments on the demurrer filed by the defendant, and being sufficiently advised in the premises,
22 doth overrule the same, to which ruling of the court the defendant then and there excepted.

And the court now grants leave to defendant to refile its answer which is done.

And this cause now having come on to be heard, on the demurrer filed by the plaintiff to certain parts of the answer filed by the defendant, and the court having heard arguments on the same, doth sustain said demurrer in part, to which the defendant then and there excepted, and doth overrule said demurrer as to part, to which ruling the plaintiff then and there excepted, and the court struck out certain parts of sentences contained in paragraph 3 of defendant's answer, as indicated therein by erasures.

And the plaintiff is given leave to re-file his reply and his amended reply to the answer of the defendent.

NOTE.—See refiling mark in accordance with above order, upon endorsement on amended answer on page 21 and refiling mark upon endorsement on reply on page 25. The parts stricken out by the Court, as stated in foregoing order, appear upon the copy of the amended answer on page 18, said parts being in parenthesis in order to show the amended answer as it was first filed.

Be it further remembered that on the 15th day of September, A. D. 1908, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, a Demurrer, which said Demurrer is in words and figures as follows, to-wit:

Demurrer.

UNITED STATES OF AMERICA,
Territory of New Mexico,
County of Santa Fe:

In the First Judicial District Court, Sitting for the Trial of Causes Arising under the Constitution and Laws of the United States.

23 No. 896.

HARRY S. FRIDAY, by His Next Friend, JOHN H. FRIDAY, Plaintiff,
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

Comes now the above named defendant, by its attorneys of record, and asks leave of the court to withdraw its answer heretofore filed herein, for the purpose of hearing this demurrer, and now interposes its demurrer, and for grounds of the same, shows to the court here:

1. Because the Act of Congress, approved June 11, 1906, under which this action was brought, is not a regulation of commerce as defined by the Constitution of the United States, and is therefore unconstitutional and void.

2. Because said Act of Congress is unconstitutional and void with respect to the action at bar, because it draws no distinction betweed Interstate Commerce and Intrastate Commerce, and if it is a regulation at all, it attempts to and does regulate Intrastate as well as Interstate Commerce, and is for that reason void.

3. Because said Act of Congress is unconstitutional and void in this, that it contravenes the Fifth Amendment to the Constitution of the United States, which provides, among oher things, that "No person shall * * * be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

4. Because said Act of Congress is unconstitutional and void in this, that it is in contravention of the Seventh Amendment of the Constitution of the United States which provides, among other things that "in suits at common law where the value in con-
24 troversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be other wise re-examined in any court of the United States than according to the rules of the common law," and the defendant, in the action at bar, is entitled to a trial by a jury of the visne.

5. Because the said Act of Congress under which this case was brought, did not draw any distinction with respect to the rights and the jurisdiction of courts, as between residents of states and residents of the territories, and the same is incapable of separation, and the act is therefore void.

6. That this court is without any jurisdiction to hear, try or

determine the case at bar, because the Supreme Court of the United States has declared said Act of Congress unconstitutional and void:

7. That for divers and sundry other good and sufficient reasons this court is without any jurisdiction to hear, determine or try said cause:

Wherefore, defendant, The Santa Fe Central Railway Company, Corporation, prays to be hence dismissed with its costs in this behalf sustained.

(Signed) CHAS. F. EASLEY,
(Signed) N. B. LAUGHLIN,
Santa Fe, N. M.,
Attorneys for Defendant.

Endorsement. No. 896. United States Court, First District. Harry S. Friday, vs. Santa Fe Central Railway Co. Demurrer. Filed in Clerk's Office, First Judicial District, Sep. 15, 1908. Francis C. Wilson, Clerk. C. F. Easley, N. B. Laughlin, Attorneys for Deft.

Be it further remembered that on the 15th day of September, A. D. 1908, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, an Amended Reply, which said Amended Reply is in words and figures as follows, to-wit:

Amended Reply.

In the District Court, First Judicial District, Territory of New Mexico.

No. 896.

HARRY SLOCUM FRIDAY, by His Next Friend, JOHN H. FRIDAY, Plaintiff,
vs.
SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

The plaintiff, for a further and amended reply herein, leave of the Court having been first obtained, states that the employees of the defendant, including this plaintiff, reported to the defendant from time to time the defects of said car, brake wheel, brake staff and other defects of the machinery and appliances of the cars and attachments thereof to the defendant and to the proper officer and agent, but, notwithstanding such reports, the said defendant failed, neglected and refused to change or repair said defects and furnish to its employees the proper car, brake wheel, brake staff and other attachments and appliances herein complained of.

(Signed) G. W. PRICHARD,
Attorney for Plaintiff.

TERRITORY OF NEW MEXICO,
County of Santa Fe:

Harry Slocum Friday, being duly sworn, states that he is the plaintiff in the above cause, and has read the foregoing amended reply and knows the same is true except as to matters stated on information and belief, and as to those matters, he believes them to be true.

—— ——.

Subscribed and sworn to before me this 10th day of September, 1908.

—— ——, *N. P.*

Endorsement: No. 896. In the District Court, First Judicial Dist. Harry Slocum Friday, by his next friend, John H. Friday, Plaintiff, vs. Santa Fe Central Railway Co., Defendant. Amended Reply. Filed in Clerk's Office, First Judicial District, Sept. 15, 1908. Francis C. Wilson, Clerk. G. W. Prichard, Attorney for Plaintiff, Santa Fe, N. M.

Be it further remembered, that at a regular term of the District Court of the First Judicial District of the Territory of New
27 Mexico, begun and held on the first Monday of September, A. D. 1908, and on the eighth day of said term, the same being Tuesday the 15th day of September, A. D. 1908, the following among other proceedings were had and entered of record, to-wit:

Trial by Jury (Commenced).

No. 896, Civil.

HARRY SLOCUM FRIDAY
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY.

And now comes the plaintiff in his own proper person, in the above entitled cause, attended by his attorney, George W. Prichard, Esq., and now comes the defendant, by its counsel, N. B. Laughlin, Esq., and Charles F. Easley, Esq., and issue being joined, now comes a jury, to-wit:

Antonio J. Romero, Jerry Thomas, Richard Gorman, Jesus Lopez, Ambrosio Aguilar, J. P. Attebury, Alfonso Salazar, Jose Eugenio Gomez, Rosalio Fernandez, Ignacio Trujillo, John W. Nutt and Nicolas Abeytia, twelve good and lawful men chosen from the body of the First Judicial District, duly empanelled and sworn to try the issues in the above entitled cause, and a true verdict to render therein, hear a portion of the evidence and retire for the night.

Be it further remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico,

begun and held on the first Monday of September, A. D. 1908, and on the ninth day of said term, the same being Wednesday, September 16, 1908, the following among other proceedings were had and entered of record, to-wit:

28 *Trial By Jury* (Continued).

No. 896, Civil.

HARRY SLOCUM FRIDAY
vs.
SANTA FE CENTRAL RAILWAY CO.

And now again come the parties as upon yesterday and the jury heretofore empanelled and sworn in the above entitled cause hear a portion of the evidence and retire for the night.

Be it further remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico begun and held on the first Monday of September, A. D. 1908, and on the tenth day of said term, the same being Thursday, the 17th day of September, A. D. 1908, the following among other proceedings were had and entered of record to-wit:

Trial by Jury (Continued).

No. 896, Civil.

HARRY SLOCUM FRIDAY
vs.
SANTA FE CENTRAL RAILWAY COMPANY.

And now again come the parties as upon yesterday and the jury heretofore empanelled and sworn in the above entitled cause, hear a portion of the evidence and retire for the night.

Be it further remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico, begun and held on the first Monday of September, A. D. 1908, and on the eleventh day of said term, the same being Friday, the 18th day of September, A. D. 1908, the following among other proceedings were had and entered of record, to wit:

Trial by Jury (Continued).

No. 896, Civil.

HARRY SLOCUM FRIDAY
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY.

29 And now come the parties as upon yesterday and the jury heretofore sworn and empanelled in the above entitled cause, hear a portion of the evidence and retire for the night.

Be it remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico, begun and held on the first Monday of September, A. D. 1908, and on the twelfth day of said term, the same being Saturday, September 19, 1908, the following among other proceedings were had and entered of record, to-wit:

Trial by Jury (Continued).

No. 896, Civil.

HARRY SLOCUM FRIDAY
vs.
SANTA FE CENTRAL RAILWAY COMPANY.

Now again come the parties as upon yesterday, and now again comes the jury heretofore duly empanelled and sworn in the above entitled cause, hear the remainder of the evidence, argument of counsel, instructions of the Court and retire in the care of two sworn bailiffs to deliberate upon their verdict, which they are instructed by the Court to seal and return into open court Monday.

Be it further remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico, begun and held on the first Monday of September, A. D. 1908, and on the thirteenth day of said term, the same being Monday the 21st day of September, A. D. 1908, the following among other proceedings were had and entered of record, to-wit:

Trial by Jury (Concluded); *Verdict and Special Findings of Jury.*

No. 896, Civil.

HARRY SLOCUM FRIDAY
vs.
SANTA FE CENTRAL RAILWAY COMPANY.

30 And now again come the parties as upon Saturday and now again comes the jury heretofore empanelled and sworn in this cause, and return here into open court its sealed verdict,

as follows: "We the jury find for the plaintiff and assess his damages at $7,500.00. J. P. Attebury, Foreman." And the jury aforesaid present the following special findings upon certain questions of fact in accordance with the request of the attorney for the plaintiff; as follows to-wit:

1. Was the brakestaff upon the defendant's car No. 618 defective? Yes.

2. Had the defendant company or its master mechanic been advised by any of the employees of the company of the defects of the cars described as rack cars, including car No. 618, before the date of plaintiff's alleged injuries? Yes.

3. Had car No. 618 been inspected by the car inspector of the company and found in bad order prior to the date of the alleged injuries? Yes.

4. Was the plaintiff in the employ of the Company as brakeman, and if so was he in the necessary discharge of his duties as brakeman at the time of receiving the alleged injuries? Yes.

5. Did the defendant company continue car No. 618 in its service after it had been reported in bad order by its car inspector, without repairing the brakestaff of that car? Yes.

6. Did the plaintiff himself, according to his testimony, report the defective condition of the rack cars, including car No 618, to the car inspector as being in bad order before the accident occurred? Yes.

7. Was the defendant company negligent in its duties to its employees in furnishing them defective cars and defective brakestaffs endangering the safety of its employees? Yes.

8. Did the injury to the plaintiff result from the negligence of the defendant company by reason of any defect or in-
31 sufficiency in the brakestaff on car No. 618? Yes.

9. Was the plaintiff, at the time of receiving his alleged injuries, carrying out the instructions of the conductor and acting within the requirements of the rules of the company in applying the hand brake on car No. 618 while descending what is called by the witness as "Clark's Hill?" Yes.

10. In applying the hand brake in the manner described by the plaintiff, was he following the custom of applying hand brakes on the rack cars on defendant's road? Yes.

11. Was his conduct in applying the brake, as described by the witnesses, reckless and gross, or was he acting in a reasonably prudent way in applying the brake with the facilities at hand? Was acting prudently.

12. What were his habits as to industry and sobriety? Good.

13. What does the proof show was the physical condition of plaintiff before he received the injuries complained of? Good.

14. Did the plaintiff receive permanent injuries from the accident complained of? Yes. If you answer he did receive permanent injuries, have they affected his earning capacity as a railroad or laboring man the balance of his natural life? Yes.

15. What is the difference between the earning capacity of the plaintiff as a laboring man or railroad brakeman before his alleged

injury and after his injury, estimated by the month or by the year? Referred to the verdict rendered.

16. What was the probable duration of plaintiff's life from the time of the accident, according to the mortality tables and testimony of the Insurance Agents, Bishop and Mayes? 42.20 yrs.

And thereupon the defendant by its counsel, gives notice
32 for a motion in arrest of judgment and a motion for a new trial.

Be it further remembered that on the 21st day of September, A. D. 1908, there were filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, the Instructions to the jury, which said instructions to the jury are in words and figures as follows, to-wit:

Instructions to the Jury.

In the District Court of the First Judicial District of the Territory of New Mexico.

No. 896, U. S. Civil.

HARRY SLOCUM FRIDAY
vs.
SANTA FE CENTRAL RAILWAY CO.

GENTLEMEN OF THE JURY: The plaintiff, Harry Slocum Friday, in this action, sues the defendant, the Santa Fe Central Railway Company, to recover damages not exceeding fifty thousand dollars for personal injuries, which the plaintiff alleges were caused by the negligence of the defendant company. The burden of proof is upon the plaintiff, both as to the issue of damages and that the cause of the alleged injury was the negligence of the defendant corporation. The defendant is a railway corporation, and, as such corporations, under the law governing this case, act by its officers, agents and employees, if from a preponderance of the evidence you believe that the alleged injury to the plaintiff was caused by their negligence. To enable the plaintiff to recover upon these issues, there must be a preponderance of the evidence in his favor; if the evidence upon these issues is equally balanced or if the same preponderates in favor of the defendant company upon these issues then the plaintiff cannot recover.

33 The court further instructs the jury that if they believe from the evidence submitted to them that the defendant company employed the plaintiff as brakeman on its train running between Torrance station and the City of Santa Fe in this Territory on the 1st day of December, 1906, it became and was the duty of the defendant to provide the train upon which the plaintiff was so employed as brakeman, with cars, appliances, brakes and machinery

free from defects and safe for the performance of the work required of plaintiff as brakeman; and if the jury find from the evidence that the defendant failed to perform its duty in this regard, and did not provide appliances, brakes and machinery free from defects and safe for the performance of the work required of plaintiff as brakeman, and that as a result of such failure of defendant to perform its duty by providing safe and suitable appliances, brakes and machinery on Car No. 618 of its said train No. 2, but on the contrary had said car No. 618 furnished with defective appliances and hand brake, on which the plaintiff was thrown, or fell, from said train while the same was in motion and while he was trying to apply such unsafe and defective hand brake on said Car No. 618 on defendant's train No. 2 in the performance of the plaintiff's duty as such brakeman, and that plaintiff was injured as alleged in plaintiff's complaint, the jury should find for the plaintiff and assess his damages as will be hereinafter explained.

The court further instructs the jury that as a matter of law the employees of a railroad corporation have a right to expect that the corporation will, so far as possible, provide for their protection in moving its trains, safe and suitable cars, appliances, brakes and machinery in good order and condition, and that it will exercise prudence, care and caution not to use cars, having defective
34 brakes and, therefore, if the jury believe from a preponderance of the evidence in this case, that the brake staff or the brake wheel used and handled by the plaintiff on said Car No. 618 and furnished by the company, was used, or handled by plaintiff as brakeman while in the employ of the defendant and in the discharge of his duty, and that said brake staff or brake wheel was unsafe and defective at the time of the alleged injuries to the plaintiff, and that by the exercise of proper prudence, care and caution the defendant could have known said brake staff or brake wheel to be in such unsafe and defective condition at the time of such injury, then, in that case, the defendant is liable and you should find for the plaintiff and assess his damages as hereinafter further explained.

Prior to and at the time of the alleged injuries to the plaintiff, December 1st, 1906, An Act of Congress, known as the safety appliance Act was in force in this Territory and Judicial District and by this law it was among other things provided that all common carriers by railroad in this Territory, before operating or running its locomotive engines in moving its traffic, shall equip said engines with a power driving wheel brake and appliances for operating the train brake system and said common carrier is prohibited from running any train in such traffic after the 1st day of January, 1898, that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brakes for that purpose. If you believe from a preponderance of the evidence in this case, that the defendant corporation was a common carrier operating a railway as such, that it was on the 1st day of December, 1906, operating and running a train

numbered 2, composed of an engine and seven cars, on its
35 road between Torrance and Santa Fe, north bound, and that the defendant was running its said train No. 2, in violation of the requirements of the law was a contributing cause to the infliction of the alleged injuries to the plaintiff, if you further believe such injuries occurred, then, I charge you, that the plaintiff cannot be chargeable with contributory negligence, even though you may believe that he was guilty of some degree of negligence.

But if you believe from the evidence that the defendant corporation is not so running its said train No. 2 on that date in violation of the law above referred to, then I charge you that you should consider whether or not the plaintiff was guilty of contributory negligence.

The Court further instructs the jury that the statute under which this action is brought among other things in effect provides; that in actions against railroad companies the fact that the employee may have been guilty of what the law calls contributory negligence, shall not be a bar to a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee as shown by the testimony.

In this case the Court instructs the jury that if they believe from the evidence that the plaintiff was guilty of contributory negligence, that is, that the injuries received by him, were caused in some degree by his own carelessness and negligent acts in handling said brakes at the time of the alleged personal injuries to him, and further believe from the evidence that the defendant company had employed the plaintiff as a brakeman on its train which had attached thereto defective cars, appliances, machinery and defective brake staff or brake wheel on said car No. 618, and by reason of said defective cars, brakestaff and brakewheel plaintiff was
36 personally injured, the jury will find for the plaintiff, and in assessing his damages against the defendant may diminish the same in proportion to the degree of negligence they may find under the evidence that the plaintiff is guilty of.

If the jury, however, believe from the evidence that the plaintiff has not been guilty of any contributory negligence and further believe from the evidence that the defendant provided defective cars, appliances, machinery and defective brakestaff or brakewheel on said car No. 618, on said train No. 2, and by reason of such defective cars, appliances, machinery, or defective brake staff or brake wheel the plaintiff, while in the employ of the defendant and in the discharge of his duty as brakeman was personally injured, the jury should find for the plaintiff and assess his damages against the defendant as hereinafter defined.

Upon the issue of contributory negligence of the plaintiff, in case it becomes your duty to consider such issue, I charge you that the burden of the proof is upon the defendant corporation to establish such contributory negligence of the plaintiff by a preponderance of the evidence.

If you believe from a preponderance of the evidence that the defendant corporation was negligent as charged in plaintiff's com-

plaint, which you will take with you to the jury room, and that such negligence of the defendant caused the alleged injuries to the plaintiff, and that the plaintiff was either not chargeable with contributory negligence or that he did not in any manner contribute to the injury, you must find for the plaintiff, and in that event you will proceed to ascertain the amount of damages the plaintiff is entitled to according to a preponderance of the evidence. The measure of damages in this case is such amount as will compensate the plaintiff for the injuries received by him.

37 If you believe from a preponderance of the evidence that such injuries are of a permanent nature and will permanently affect the earning capacity of the plaintiff, you have a right to consider the earning capacity of the plaintiff before the injury and after the same had been inflicted. In considering the question of damages after the injury, if you believe the same to be permanent, you may consider the annuity or mortality tables, which the court admitted in evidence for your information. These tables are not conclusive and binding upon you but are admitted solely to aid you in reaching certain reasonable and proper conclusions, because they show the result of certain observations and calculations which may be of assistance to you in your consideration of the amount of damages the plaintiff is entitled to as compensation for injuries received.

The plaintiff asks for compensation for a doctor bill of two hundred and fifty dollars for services rendered by a physician and surgeon employed by the family of the plaintiff. It is for you to consider the testimony both for the plaintiff and the defendant as to this, and determine whether the plaintiff is entitled to this sum or not, in addition to other damages, if you should allow other damages.

If you believe from the evidence that the injuries received by the plaintiff were caused by the carelessness and negligent acts of the plaintiff himself and not because of the negligence of the defendant, you should find for the defendant.

You are the judges of the weight of the evidence and of the credibility of the witnesses who have testified in the case, and if you believe that the evidence is conflicting to such extent that you cannot believe it all, then it is for you to determine what part of it is true and what part of it is knowingly and wilfully false.

38 If you find for the plaintiff, the form of your verdict should be:

"We the jury find for the plaintiff and assess his damages at — dollars.

—— ——, *Foreman.*"

If you find for the defendant, the form of your verdict should be:

"We the jury find for the defendant,

—— ——, *Foreman.*"

If you find for plaintiff but believe from the evidence that the plaintiff was guilty of some degree of contributory negligence, you

should state in your verdict the amount of damages you believe the plaintiff entitled to, less such amount as you believe the plaintiff's negligence contributed to the cause of injury. Prepare a verdict accordingly.

When you have agreed upon a verdict one of your number, acting as your foreman should sign the verdict you agree upon and then the same should be returned into Court in the presence of the entire jury.

(Signed) JOHN R. McFIE,
Associate Justice, etc.

Endorsement: No. 896. U. S. District Court, First Judicial District. Harry Slocum Friday vs. Santa Fe Central Ry. Co. Instructions to the jury. Filed in Clerk's Office, First Judicial District, Sep. 21, 1908. Francis C. Wilson, Clerk.

Be it further remembered that on the 21st day of September, A. D. 1908, there was filed in the office of the Clerk of the
39 District Court of the First Judicial District of the Territory of New Mexico, the special instructions of the court, which said special instructions are in words and figures as follows, to-wit:

Special Instructions.

GENTLEMEN OF THE JURY: Counsel on both sides of this case consent that you may return a sealed verdict. You will therefore remain together until you have agreed upon a verdict and answered the special interrogatories. When you have agreed upon a verdict and answered the special interrogatories, and your foreman has signed the same, you should enclose both your verdict and the interrogatories in an envelope now handed to you, seal the same and let your foreman retain it in his possession until Monday morning, at 9 o'clock A. M., when you should return the same into court in the presence of the entire jury. Let no one know what your verdict is until you have returned the same into court.

(Signed) JOHN R. McFIE,
Associate Justice.

Be it further remembered that on the 21st day of September, A. D. 1908, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, the following "Given" Instructions, for the plaintiff and defendant, which said "Given" Instructions are in words and figures as follows, to-wit:

Instructions Asked for by Plaintiff.

The Court instructs the Jury that a conductor of a train is the superior in authority and grade in the train crew and has charge of the train and its operations, and all other members of the crew are under his control and subject to his orders, which they must

obey whether they concur in the necessity or the propriety
40 of them or not. He is the representative of the Company and is vested with all its authority over its train and charged with all the duties and responsibilities which the Company owes to its employees. He is the Vice Principal of the Company and the Company is liable for any negligence on his part when he is acting in his capacity as Conductor.

For Plaintiff,

Given.

(Signed) JOHN R. McFIE, *Judge.*

Instructions Asked for by Defendant.

And you are further instructed that unless you find, from all the evidence before you in this case, that the defendant corporation was guilty of negligence with respect to the matter and conditions of the brake staff and brake wheel on said car No. 618, at and immediately preceding the time the train to which said car was attached left Williams Spur and descended Clark Hill, to a greater degree than the contributory negligence of the plaintiff, if you find that he was guilty of any contributory negligence with respect to the condition of said brakestaff and brakewheel, or either of them, on said car No. 618, then and in that case, you should find for the defendant, unless you further find from all the evidence that the contributory negligence of the plaintiff, if you find him guilty of any contributory negligence, was only slight, and that of the defendant was gross in comparison.

You are further instructed that if you find from all the evidence before you in this case, that the plaintiff was guilty of contributory negligence, even though in a slight degree and that the defendant was guilty of gross negligence, then in assessing the damages you should diminish such damages in proportion to the amount of negligence attributable to the plaintiff; and if you should further
41 find that the contributory negligence on the part of the plaintiff, if you find that the plaintiff was guilty of any contributory negligence, was equal to or exceeded the negligence on the part of the defendant, if you find it was guilty of any negligence, then you should find for the defendant.

Given.

(Signed) J. R. McFIE, *Judge.*

Endorsement: No. 896. Harry Slocum Friday vs. Santa Fe Central Ry. Co. Instructions asked for by plaintiff and defendant and given. Filed in Clerk's Office, First Judicial District, Sep. 21, 1908. Francis C. Wilson, Clerk.

Be it further remembered that on the 21st day of September, A. D., 1908, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, the Instructions asked for by plaintiff, and "Refused," which said instructions are in words and figures as follows, to-wit:

Instructions Asked for by Plaintiff and Refused.

In the United States Court.

The jury is instructed by the Court that if they believe from the evidence in this case that the plaintiff received personal injuries while in the employ of the defendant on the first day of December, 1906, as brakeman, and that such injuries were received
42 while in the actual necessary discharge of his duties as brakeman for the defendant, and that such injuries resulted in whole or in part by reason of a defective or insufficient brake staff or brake wheel on the car of the defendant while such car was in motion, and that such insufficient brake staff or brake wheel was known to exist by the defendant before the alleged injury, or which had been reported to exist to defendant or its master mechanic by the plaintiff or any of the employees of the defendant prior to the date of the alleged injuries, then, in that case, the jury will find the plaintiff not guilty of any contributory negligence, but will find for the plaintiff and assess his damages.

The Court further instructs the jury, that if they believe from the evidence in this case that the plaintiff, while in the actual discharge of his duties as brakeman in the employ of the defendant, received the personal injuries complained of in his complaint on the first day of December, 1906, and that such injuries were the result of a defective or insufficient brake wheel or brake staff on the car of the defendant, and that such defective brake wheel or brake staff was known to exist by the defendant prior to the injuries complained of, or which had been reported to exist by the plaintiff or any of the employees of the company to said company or its master mechanic, then, in that case, you will find that the plaintiff assumed no risk of his employment by the defendant and they will further find for the plaintiff and assess his damages.

(Each of which two instructions is marked as follows: "Refused, J. R. McFie, Judge.")

43 Endorsement: No. 896. Harry Slocum Friday vs. Santa Fe Central Ry. Co. Refused instructions, Plaintiff. Filed in Clerk's Office, First Judicial District, Sept. 21, 1908. Francis C. Wilson, Clerk.

Be it further remembered that on the 21st day of September, A. D. 1908, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, the Instructions asked for by the defendant and "Refused," which said instructions are in words and figures as follows, to-wit:

Instructions Asked for by Defendant and Refused.

In the United States District Court, First Judicial District, Territory of New Mexico.

No. 896.

HARRY S. FRIDAY, by JOHN H. FRIDAY, His Next Friend, Plaintiff,
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

Comes now the above named defendant corporation, by its attorneys of record, and requests the court to give the jury the following instructions, to-wit:

1. Gentlemen of the jury, you are instructed that if you believe from all the evidence before you in this case, that the plaintiff knew the condition of the brakestaff and brakewheel, or either of them, on car 618, by which it is alleged the plaintiff sustained the injuries complained of, at Williams' Spur and at the top of Clark
44 Hill, of that by reasonable and ordinary care, precaution and diligence exercised on his part, and as to whether or not the brakestaff and brakewheel, or either of them, were then in a defective condition, and that he knew or could have known the condition of the said brakestaff or brakewheel, or both of them, before and at the time the train upon which said car 618 was attached and a part of, was starting to descend said Clark Hill, then you are instructed that the plaintiff was guilty of contributory negligence.

4. You are further instructed that in your deliberations on the claim of $250.00 made by the plaintiff for services alleged to have been rendered to the plaintiff by Dr. James A. Massie, for surgical treatment to the plaintiff, you should find for the defendant on that point unless you further find from all the evidence before you in this case, that the defendant neglected, refused or declined to furnish competent and skillful physicians and surgeons, to render the plaintiff all proper and necessary assistance in the treatment of his injuries, and unless you should further find that it became necessary, through some neglect or fault of the defendant for the plaintiff to employ Dr. Massie, or some other competent physician and surgeon, to render additional surgical and medical attention, in addition to that furnished and supplied by the defendant, if you find that the defendant did furnish competent and skillful physicians and surgeons for the proper and necessary treatment of the injuries of the plaintiff.

(Each of which said above and foregoing instructions is marked, "Refused, J. R. McFie, Judge.")

45 Endorsement: No. 896. Harry Slocum Friday vs. Santa Fe Central Ry. Co. Refused Instructions, Defendant. Filed in Clerk's Office, First Judicial District, Sep. 21, 1908. Francis C. Wilson, Clerk.

Be it further remembered that on the 25th day of September, A. D. 1908, there was filed in the office of the Clerk of the District Court of the First Judicial District, of the Territory of New Mexico, a Motion for a New Trial, which said Motion is in words and figures, as follows, to-wit:

Motion for a New Trial.

UNITED STATES OF AMERICA,
Territory of New Mexico:

First Judicial District Court.

No. 896.

HARRY SLOCUM FRIDAY, by His Next Friend, JOHN H. FRIDAY, Plaintiff,
v.
THE SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

And now comes the above named defendant, by its attorneys of record, and moves the court to set aside the verdict granted herein, and to grant it a new trial in said cause, and for grounds of said motion the defendant shows to the court here the following, to-wit:

1. Because the court erred in denying the defendant's motion to instruct the jury to return a verdict for the defendant, when the plaintiff closed the taking of his testimony and before the defendant offered any testimony on its side.

2. Because the court erred in admitting, over the objections of the defendant, incompetent, irrelevant and immaterial testimony of E. E. Friday, a witness called and sworn and who testified in behalf of the plaintiff, to which ruling of the court, the defendant then and there excepted.

46

3. Because the court erred in admitting illegal, incompetent, irrelevant and immaterial testimony offered by the plaintiff and against the defendant by the witnesses, A. R. Jones, M. J. De Meir, W. R. Ratliff, W. G. May, Robert Taylor and Fred Fisher, over the objections of the defendant to the conditions of other cars in said Train No. 2, than car 618, upon which it is alleged the plaintiff sustained the injuries complained of, and to the conditions of other cars belonging to said defendant corporation, not included in said Train No. 2, to all of which rulings of the court the defendant then and there excepted.

4. Because the court erred in admitting in evidence, over the objections of the defendant, Exhibits "A," "B," "C," "D," "E," "F," "G," and "F" offered by the plaintiff, to all of which rulings by the court the defendant then and there excepted.

5. Because the court erred in instructing the jury as to a part of the Act of Congress known as the Safety Appliance Law, and not instructing as to all of that law applicable to the case at bar, to which the defendant then and there objected and excepted.

6. Because the court erred in giving illegal and improper instructions to the jury, over the objections of the defendant to all of which the defendant then and there excepted.

7. Because the court erred in admitting illegal and improper evidence offered by the plaintiff, over the objections of the defendant, to all of which rulings of the court, the defendant then and there excepted.

8. Because the court erred in excluding from the jury, over the objections of the defendant, legal and proper evidence offered by the defendant, to all of which defendant then and there excepted.

9. Because the court erred in refusing to give instructions asked by the defendant in paragraphs 1 and 2, to all of which rulings of the court the defendant then and there excepted.

10. Because the court erred in failing to number his instructions given of his own motion to the jury, in consecutive paragraphs, to all of which the defendant then and there excepted.

47 11. Because the court erred in giving instructions to the jury asked for by the plaintiff over the objections of the defendant, to all of which rulings of the court, the defendant then and there excepted.

12. Because one of the jurors, John W. Nutt, who after he had been examined, accepted and sworn to try this case, and while the case was on trial, improperly held conversations with E. E. Friday, the brother and principal witness for the plaintiff, all of which appears in the record.

13. Because the law under which this case was brought, tried and determined, was and is void and of no effect.

14. Because the verdict found and returned by the jury is excessive.

15. Because the verdict of the jury is contrary to both the law and the evidence.

16. Because the record does not disclose in which of the judicial districts of this Territory, the injury to the plaintiff occurred.

17. Because the special findings of the jury are contrary to the law and the evidence, and that all of the interrogatories propounded by the plaintiff to the jury, were not directly answered by them.

18. And because of the divers and sundry errors which intervened in the trial of this case, all of which appear in the record.

Wherefore, the said defendant moves the court to vacate and set aside the verdict found and returned by the jury in favor of the plaintiff, Harry S. Friday, and against the said defendant, The Santa Fe Central Railway Company, and to grant said defendant a new trial of this case.

(Signed) CHAS. F. EASLEY,
(Signed) N. B. LAUGHLIN,
Santa Fe, N. M.,
Attorneys for Defendant.

48 Endorsement: No. 896. First Judicial District. In the United States Court. Harry S. Friday, by his next friend, John H. Friday, vs. The Santa Fe Central Railway Company. Mo-

tion for New Trial. Filed in Clerk's Office, First Judicial District, Sep. 25, 1908. Francis C. Wilson, Clerk. N. B. Laughlin, Chas. F. Easley, Santa Fe, N. M., Attorneys for defendant.

Be it further remembered, that on the 12th day of October, A. D. 1908, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, a Motion in Arrest of Judgment, which said Motion in Arrest of Judgment, is in words and figures, as follows, to-wit:

Motion in Arrest of Judgment.

UNITED STATES OF AMERICA,
Territory of New Mexico:

First Judicial District Court.

No. 896.

HARRY SLOCUM FRIDAY, by His Next Friend, JOHN H. FRIDAY, Plaintiff,
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

And now comes the above named defendant, by its attorneys of record, and moves the court to arrest the judgment in the above entitled case, and for grounds of this motion, shows here to the court as follows:

49 1. Because the law under which this suit and action was brought, prosecuted and tried, is and was void and of no effect.

2. Because the Act of Congress of the United States, approved April 28, 1908, is, as to Section 8 of said act, under which this court assumed jurisdiction and tried this suit, retroactive, unconstitutional and void as to the case at bar.

3. Because this court had not any jurisdiction to hear, try or determine this case.

4. Because, for and on account of the various and sundry errors appearing on the face of the record, no good and sufficient verdict and judgment has been rendered in this case.

5. Because of the variance between the allegations in the complaint and the proof and testimony as produced by the plaintiff.

Wherefore, the above named defendant, The Santa Fe Central Railway Company, by its attorneys of record, moves to arrest the judgment in the above entitled case.

(Signed) CHAS. F. EASLEY,
(Signed) N. B. LAUGHLIN,
Santa Fe, N. M.,
Attorneys for Defendant.

Endorsement: No. 896. First Judicial District. In the United States Court. Harry S. Friday, by his next friend, John H. Friday, vs. The Santa Fe Central Railway Company. Motion in Arrest of Judgment. Filed in Clerk's Office, First Judicial District, Oct. 12, 1908. Francis C. Wilson, Clerk. N. B. Laughlin, Chas. F. Easley, Santa Fe, N. M., Attorneys for defendant.

50 Be it further remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico, begun and held on the first Monday of September A. D. 1908, and on the fifteenth day of said term, the same being Monday, the 12th day of October, A. D. 1908, the following among other proceedings were had and entered of record, to-wit:

Order Overruling Motions for New Trial and in Arrest of Judgment; Judgment of the Court, and Order Overruling Motion for Appeal.

No. 896, Civil.

HARRY SLOCUM FRIDAY
vs.
SANTA FE CENTRAL RAILWAY COMPANY.

This cause coming on to be heard upon the motion of the defendant for a new trial, and a motion in arrest of judgment, the parties appear as hereinbefore stated, and the Court hears the argument for and against said motions, and being fully advised in the premises, doth overrule said motion for a new trial and motion in arrest of judgment to which ruling of the Court, the defendant by its counsel then and there excepts.

Thereupon, it is Considered, Ordered and Adjudged by the Court that the plaintiff do have and recover of and from the defendant, the amount of the verdict hereinbefore entered by a jury in this cause, to-wit: Seven Thousand Five Hundred Dollars ($7,500.00) with interest at the rate of six per cent per annum from date, also his costs in this action, for all of which let execution issue in due course.

And now again comes the defendant by its counsel and moves the Court to grant an appeal from the verdict of the jury and judgment of the Court thereon, which motion the Court allows and fixes the appeal bond at the sum of $15,000.00, with stay of execution.

Be it further remembered, that on the 7th day of December, A. D. 1908, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, a Supersedeas Bond, which said Supersedeas Bond is in words and figures as follows, to-wit:

51 *Supersedeas Bond.*

Know all men by these presents, That we, the New Mexico Central Railroad Company, corporation, as principal, and W. S. Hopewell and Thomas P. Gable, as sureties, are held and firmly bound unto Harry Slocum Friday, who sues by his next friend, John H. Friday, in the penal sum of Fifteen Thousand dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, and our heirs, executors, administrators and legal representatives, firmly by these presents.

Signed with our hands and sealed with our seals, this 5th day of December, 1908.

The conditions of the above obligation are such that, whereas, the said Harry Slocum Friday, by his next friend John H. Friday, did on the 12th day of October, recover a judgment in the United States Court sitting in and for the First Judicial District in the Territory of New Mexico, against the Santa Fe Central Railway Company, a corporation, in the sum of Seven Thousand Five Hundred dollars damages, and whereas, the said Santa Fe Central Railway Company has since changed its name to and has been conveyed, assigned and transferred to the said New Mexico Central Railway Company, and whereas, the said New Mexico Central Railroad Company has succeeded to all the rights and obligations of the said Santa Fe Central Railway Company, and whereas, the said Santa Fe Central Railway Company, did on the *the* said 13th day of October, 1908, pray for and was granted an appeal from the decision of said court in rendering said judgment, to the Supreme Court of the Territory of New Mexico:

Now, therefore, If the said above bounden principal shall prosecute its said appeal with due diligence and effect and without delay in the said Supreme Court, and if the said decision of the said court wherein said judgment was rendered, shall be affirmed, or this appeal be dismissed and if it, the said above bounden principal shall comply with the judgment so rendered by said United States Court for said First Judicial District within the Territory aforesaid, and shall pay

52 all damages and costs adjudged against it in the said United States Court for said First Judicial District, as aforesaid, and in said Supreme Court on its said appeal, then and in that event this obligation shall be null and void, but otherwise shall remain in full force and effect.

In witness whereof, we have hereunto set out hands and affixed our seals the day and year first above written.

[SEAL.] NEW MEXICO CENTRAL RAILROAD COMPANY,
By ROBERT LAW, [SEAL.]
Its President.
W. S. HOPEWELL. [SEAL.]
THOMAS P. GABLE. [SEAL.]

Attest:
H. A. COOMER,
Assistant Secretary.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

On this 5th day of December, 1908, before me appeared Robert Law, to me personally known, who, being by me duly sworn did say that he is the President of the New Mexico Central Railroad Company mentioned in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation, by authority of its Board of Directors, and the said Robert Law acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[SEAL.] (Signed) CHAS. F. EASLEY,
Notary Public.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

On this 7th day of December, 1908, before me personally appeared W. S. Hopewell, and Thomas P. Gable, to me known to be the persons described in, and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In testimony whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

(Signed) CHAS. EASLEY,
Notary Public.

53 TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

This day personally appeared before me, W. S. Hopewell and Thomas P. Gable, who being first duly sworn did say on oath, each for himself and not one for the other, that he, the said W. S. Hopewell is worth the sum of Fifteen Thousand Dollars, and that he, the said Thomas P. Gable is worth the sum of Five Thousand Dollars in property situate in the Territory of New Mexico, unencumbered and subject to sale on execution, and over and above his just debts and liabilities.

(Signed) W. S. HOPEWELL.
(Signed) THOMAS P. GABLE.

Subscribed and sworn to before me this 7th day of December, 1908.

(Signed) CHAS. EASLEY,
Notary Public.

Approved as to form and sufficiency of securities herein, this 7th day of December, 1908.

(Signed) FRANCIS C. WILSON, *Clerk.*

Endorsement: No. 896. U. S. District Court, First Judicial District, Territory of New Mexico. Harry S. Friday, by his next friend, John H. Friday, vs. The Santa Fe Central Railway Co. Supersedeas Bond. Filed in Clerk's Office, First Judicial District, Dec. 7, 1908. Francis C. Wilson, Clerk.

54 *Plaintiff's Case.*

Mr. Prichard stated plaintiff's case to the jury.

Dr. J. A. MASSIE, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination by Mr. PRITCHARD:

Q. Dr. Massie, state your full name, if you please?
A. James A. Massie.
Q. Where do you reside?
A. Santa Fe.
Q. What is your profession?
A. Physician and surgeon.
Q. How long have you been a physician and surgeon?
A. Seventeen years.
Q. Are you a graduate of any institution, Doctor?
A. Yes sir.
Q. What institution?
A. University of Toronto, Canada.
Q. You are a regularly licensed physician in this Territory?
A. I am.
Q. Where were you residing, Doctor, about the first day of December, 1906?
A. In Santa Fe.
Q. Were you engaged in your profession at that time?
A. I was.
Q. Do you remember ever having seen this young man that sits behind me here?
A. I do.
Q. Do you remember whether you saw him about that date?
A. I did, in the evening of December 1st, 1906.
Q. Now, Doctor, I will let you state the circumstances under which you saw him at that time?
A. McBride, the station agent of the Santa Fe Central, telephoned me in the evening of December 1st, 1906, asking me to meet young Friday at the Sanitarium; that he had met with an accident down the road; so I went across the road to the Sanitarium and met them when they came in.
Q. Who were with him?
A. As well as I can remember, Dr. Diaz, S. B. Grimshaw, his brother E. E. Friday, I think one of the train hands, but who
55 it was I cannot remember.
Q. The Sanitarium you speak of, where is that?
A. The Sisters' Sanitarium.

Q. Across from the court house here?

A. Yes sir.

Q. What time was that in the evening?

A. I do not remember the exact hour, I know it was dark, I know I had had my supper.

Q. Now, state whether you had any relations to this case as a physician and surgeon.

A. I had, I took charge of the arm of the boy after he came in, and did all the surgical work.

Q. Where did you do this surgical work?

A. At the Sisters' Sanitarium.

Q. Now, Doctor, I will have you state what discoveries you made, if any, as to the wounds or injury upon the person of this plaintiff at that time.

A. The arm, when I took off the temporary dressings, was a comminuted fracture of both bones of the left forearm about the juncture of the upper and middle third. The skin around the arm was badly broken and bruised, but in the hopes that the circulation had not all been cut off, I just re-dressed the arm and left it until the following morning, trusting that I might be able to save it, but when I saw the arm the next day, it was quite evident that gangrene was setting in, so we had to amputate it, and I took it off about two and a half inches below the elbow. There was a ragged cut or tear on the left side of the face on the upper lip, extended from a little over the right side of the nasal septum up on the left cheek, the total length was about two inches. The whole lip was turned down and pretty well filled up with cinders and dirt; that I just simply cleaned out and sewed the edges of the wound together.

Q. How long was this plaintiff under your charge as his physician?

A. Eleven days; that is, under my care every day for eleven days.

Q. You spoke about the gangrene that was setting in the arm, in what portion of the arm did these indications appear?

A. All below the wound.

56 Q. What did you determine the next day as to the necessity of removing the arm?

A. Well, the arteries having been crushed and the circulation cut off, evidently there would be no hope of saving the arm below the wound, so it had to come off.

Q. When was it you dressed the other wound you speak of in the face?

A. I sewed it up at the same time I dressed the arm; just cleaned it up that night.

Q. Did you make any examination of the patient as to what his general health was apart from these wounds or injuries?

A. He was suffering somewhat from shock, but all things considered he was in very good condition.

Q. What were the indications, if any, as to the loss of blood?

A. Why, his pulse was weak, and he was decidedly anæmic.

Q. Now, Doctor, what were the indications, if any, as to the plain-

tiff being in sound health and good physical condition, apart from these bruises and wounds and the loss of blood and weakness?

A. He was in good physical condition.

Q. State whether during that time that he was under your charge, he had anybody as a nurse to attend him in his sickness, whether you know?

A. He had Sister Wilhelma at the Sanitarium.

Q. Now, Doctor, what was your bill for these services?

Defendant objects to any proof of special damages because there are no allegations in the complaint alleging special damages.

By the COURT: Objection overruled.

Defendant excepts.

A. Two hunderd and fifty dollars.

Q. Doctor, I would like to have you point out upon the plaintiff here the wound that you refer to upon the mouth?

A. The wound extends from about one-quarter of an inch to the right of the nasal septum to an inch to the left of the left nostril.

Q. Describe the character of that wound or laceration at the time of the accident?

57 Defendant objects because the Doctor has already described it.

By Mr. PRICHARD: I will change the form of the question.

Q. What effect, if any, has that wound that you have described which you treated on the face, had in deforming the face of the plaintiff?

A. The muscles that control the upper lip were cut through, and while I sewed them together again the union was apparently not perfect and has allowed some prolapsus of the upper lip on that side of the face.

Q. Can you state from that whether or not it left any disfigurement on his face?

A. Yes, it does.

Q. Can you state whether or not this disfigurement to which you refer to is permanent or only temporary?

A. It is permanent.

Q. What do you mean by that, permanent?

A. Well, it will last him the rest of his natural life.

Cross-examination.

Questions by Judge LAUGHLIN:

Q. Who employed you, Doctor, to attend the plaintiff on the occasion referred to?

A. Mr. McBride was the one who telephoned, at, I believe, the request of E. E. Friday.

Q. Did the plaintiff pay you your bill for $250.00?

By Mr. PRICHARD: "That is immaterial."

By the COURT: "It may be shown who paid it."

A. Mr. E. E. Friday made himself responsible for the bill.

The court here adjourned until ten o'clock A. M. September 16, 1908.

Pursuant to adjournment the court met at ten o'clock A. M. September 16, 1908.
Present, as of yesterday.

E. E. FRIDAY, a witness called in behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination by Mr. PRICHARD:

Q. Mr. Friday, state your full name.
A. Elmer E. Friday.
Q. Where do you reside?
58 A. Santa Fe, New Mexico.
Q. How long have you been residing in Santa Fe?
A. A little over four years.
Q. What is your business or occupation?
A. Conductor on the Santa Fe Central.
Q. The defendant in this case, the Santa Fe Central Railway Company?
A. Yes sir.
Q. How long have you been in the employ of that company?
A. Four years ago the first of last June.
Q. In what capacity, Mr. Friday?
A. Conductor and brakeman.
Q. Had you any railroad experience before you entered the employ of this defendant?
A. Yes sir.
Q. How long have you been in the railroad business all told, as an employé?
A. Twenty-one years ago last March, I think.
Q. What roads had you worked on before you came here?
A. St. Joseph and Grand Island Railroad company; Union Pacific; Denver and Rio Grande, and Rio Grande Southern.
Q. Were you a conductor on this Santa Fe Central on or about the first day of December, 1906?
A. I was.
Q. Where were you during that day? The first day of December, 1906?
A. I was on train No. 2 between Torrance and Santa Fe.
Q. Train No. 2?
A. Yes sir.
Q. Which way were you going?
A. North bound.
Q. You were coming from Torrance to Santa Fe?
A. Yes sir.
Q. Where was that train made up?
A. It was made up at Torrance.
Q. Of what did the train consist?

A. It consisted of an engine, an A., T. & S. F. gondola four Santa Fe Central rack cars loaded with sheep, one caboose and one coach.

59 Q. What do you mean by gondola?

A. Coal car.

Q. Was that a car of the Santa Fe Central Railway, or a car of some other company?

A. A car belonging to the Atchison, Topeka and Santa Fe.

Q. How many rack cars did you say there were?

A. Four.

Q. And one caboose and one coach?

A. Yes sir.

Q. To what company did these rack cars belong?

A. Santa Fe Central Railway.

Q. And the caboose and coach?

A. Santa Fe Central Railway.

Q. What you mean when you speak of rack cars, the four rack cars?

A. Well, it is a flat car racked up on both sides and ends enabling them to hold sheep.

Q. Do you remember the numbers of these rack cars?

A. Yes sir.

Q. How were they numbered beginning at the end of the train where the engine was?

A. The first car next to the engine was the A., T. & S. F. gondola; the next was Santa Fe Central rack car No. 621; the next was Santa Fe Central 618.

Q. Was that a rack car?

A. Yes sir; the next was 1012 rack car; the next was 624 Santa Fe Central rack; the next was the caboose No. 51; the last on the rear of the train was coach No. 11.

Q. There were seven cars then besides the engine?

A. Yes sir.

Q. Now, I understand you to say that you were in the employ of the Santa Fe Central Railway company on that date as conductor?

A. Yes sir.

Q. Who was in charge of the train on the day named, as conductor?

A. I was.

Q. I will ask you what day this was that you speak of having charge of the train from Torrance to Santa Fe, what day was it?

A. It was the first day of December, 1906.

Q. You had charge of it as conductor on that day?

60 A. Yes sir.

Q. Were you familiar with the condition of those cars?

A. Yes sir.

Q. Now, you know this young man here?

A. Yes sir.

Q. Is he related to you, Mr. Friday?

A. He is my brother.

Q. Where was he on that date?

A. He was acting in the capacity of brakeman.

Q. On this train No. 2?
A. Yes sir.
Q. Was there any other brakeman on the train except the plaintiff on that date?
A. No sir.
Q. Do you know how long he had been in the employ of the company on that date, about how long?
A. I think nearly seven months.
Q. Had he had any railroad experience prior to that time, if you know?
A. Not that I know of.
Q. Do you know the date when he entered the employ of the company?
A. The 31st day of May, 1906, if I remember correctly.
Q. Was he in the employ of the company on the first of December, 1906?
A. He was.
Q. In what capacity?
A. As a brakeman.
Q. Do you know a place on this line of railway called Williams Spur?
A. I do.
Q. Do you remember whether you passed that point coming to Santa Fe on that day?
A. I did.
Q. Now, what time of day was it that you passed Williams Spur?
A. 5:10 P. M. as near as I can remember.
Q. Where is this place called Williams Spur.
A. It is about thirty-three and a half miles south of Santa Fe on the Santa Fe Central Railway.
61 Q. Is this place located upon any high or low point on the railroad?

By Judge LAUGHLIN: "I object if the court please; let the witness tell without suggesting to him; he is an intelligent man."
By the COURT: "Yes, avoid suggestions."

Q. Did the train stop there on that day?
A. Yes sir.
Q. What was the occasion of the train stopping there?
A. It stopped there to test the air brakes.
Q. Why was it necessary to test the air brakes at that particular place?
A. It was to ascertain the condition of the brake before descending Clark hill.
Q. What do you mean by Clark Hill?
A. It is a heavy grade between Williams Spur and the Clark siding going north.
Q. What is the distance between these points?
A. I think five and a half miles.
Q. You speak of a heavy grade between these points, do you know what that grade is?

A. Why, I think it averages about three and four-tenths.
Q. What do you mean by three and four-tenths?
A. Well, that is three and four-tenths feet to the hundred.
Q. Was it your habit when you were on that train, or on any train going down to that point, to stop at Williams Spur to examine the brakes?

Defendant objects on the ground that the question is leading.

Q. State whether it was your habit to stop to examine the air going down that hill.
A. It was.
Q. Now, on this day that you stopped there for that purpose, did you make an examination of the air appliances to determine the condition of the air?
A. We did.
Q. State to the jury what the result of that examination was.
A. Well, as to the general condition of the air brake appliances there were two cars cut out, and two of the cars had leaky
62 packing rings and the brake cylinders the air was leaking off.
Q. What do you mean by the cars being cut out?
A. Well, the air was cut out between the train and the auxiliary reservoir which supplies the braking power for each car.
Q. These two cars to which you refer as having the air cut out, could the air appliances or the air brakes operate on these two cars?
A. No.
Q. Then so far as these two cars were concerned, you had no air with which to operate the brakes?
A. No sir.
Q. Can you name these two cars?
A. Yes sir.
Q. Which ones were they?
A. 618 and 624 Santa Fe Central rack.
Q. Two of the rack cars?
A. Yes sir.
Q. Now, how about the air as to the other two rack cars?
A. Well, when the engineer would make an application of air, the piston in the brake cylinder would shove out and the air would leak by the packing leather and allow the brakes to release and resume their normal condition.
Q. In a case like that, what would be the effect of the force of the air brake?
A. Well, it would be very light.
Q. What do you mean by that?
A. Well, it would apply the brakes but immediately leak right off.
Q. So as to release the brakes from the car wheels?
A. Yes sir.
Q. Now, were there any other cars, including the engine, in which the air was defective?
A. No, there was absolutely no air brakes at all on the engine.
Q. Should there have been?
A. Yes sir.
Q. Now, does it occur to you whether there was any other defects

upon or connected with these flat cars that you have spoken of?

63 A. There was.

Q. Will you name them?

A. There was 621, 618 and 624.

Q. Well, now mention the defects, if there were any?

Defendant objects to any evidence of defects except upon the car upon which it is alleged the accident occurred.

Objection overruled.

Defendant excepts.

Q. Now, Mr. Friday, you have mentioned two of the rack cars that had no air, and the two others that you described in which the air would not work, and you have also mentioned the engine as being without air; will you state what effect, if any, that would have upon the speed of the train down that grade?

Defendant objects to the question because the same is irrelevant, incompetent and immaterial, and further objects to any testimony with reference to the condition of the machinery on the engine, or any other car in that train, except car 618, upon which it is alleged plaintiff received his injuries.

Objection overruled.

Defendant excepts.

A. Well, I think it would impair the braking power so far as that train was concerned, fully 50 per cent.

Defendant moves to strike out the answer because he says he thinks.

By Mr. PRICHARD: "I suppose I can make it to avoid that objection."

Q. What do you know as to the lack of air on these cars having any effect upon the speed of that train down that grade?

A. Well, it would impair the braking power of that train, that is, so far as the air brakes were concerned, fully 50 per cent.

Q. State whether or not there was a hand brake on car 618?

A. There was.

Q. Now, do you remember seeing this plaintiff there at the time that the train stopped in order for you to examine the condition of the cars?

A. Yes, sir.

Q. Where was he?

64 A. He was with me examining the air brakes and cars.

Q. Do you know where he was when the train started down the hill.

A. I do.

Q. Where was he?

A. He was on the brakewheel on 618.

Q. At which end of the car was that brakewheel?

A. North end.

Q. Now, do you know why he was there?

A. Yes sir.
Q. For what purpose was he there?
A. To apply the brake and help control the speed of the train going down.
Q. Do you know under whose instructions, if any, he was there to apply the brake to that car?
A. Yes sir.
Q. Whose?
A. My own.
Q. When did you last see him in that connection?
A. Well, just shortly after we left the top of the hill.
Q. Where was he when you saw him?
A. He was applying the brake on this car.
Q. Now, Mr. Friday, you had seen that brakewheel and brakestaff, had you?
A. I had.
Q. I wish you would describe to the jury that brakestaff and brakewheel?
A. Well, the staff is set into the end of the car, I think perhaps, it extends down anywhere from 15 to 18 inches below the deck floor of the car, and this particular staff was 16 inches high, if I remember correctly, from the deck floor of the car to the top of the staff or brakewheel.
Q. State whether or not the brakewheel rested upon that staff.
A. It did.
Q. Will you describe to the jury how it rested upon that staff?
A. The top end of the staff was squared and tapered, and the wheel set down on the staff.
Q. What was on the end of the staff and above the wheel to hold the wheel in place, if anything?
65 A. Not a thing.
Q. You have stated that you have been in the railroad business for some time, can you state to the jury what the usual length of a brakestaff is, as used by railroads?
A. Why, I can state about what the usual length of them is above the deck of the car.
Q. You may state it if you will?
A. About thirty inches.
Q. Now, will you indicate to the jury with your hand about the length of brakestaffs that are used by railroads, by holding your hand a certain distance from the floor?
A. Well, I should judge about that height (indicating height with hand 37 inches from the floor).
Q. Will you also indicate in the same way to the jury about the height of this particular brakestaff that you have referred to, above the deck of the car?
A. I should judge about that height (indicating with hand above the floor, and measured found to be about 14 inches.)
Q. Will you indicate to the jury the position that a brakeman would have to assume in order to apply that hand brake?
A. Well, you would have to get down about like this: (indicating the position himself by stooping over.)

Q. In your railroad experience have you observed what the arrangements are as to the top of brakestaffs when the wheels are on?
A. I have.
Q. How are they usually arranged?
A. There is usually a thread and a nut on the end of the staff to keep the wheel from slipping off.
Q. Then, as I understand you, the rule is that the brakestaff passes up through the wheel and there is a thread around that end of the brakestaff, and a nut screws on the top of the staff?
A. Yes sir.
Q. What is that for?
A. To keep the wheel from slipping off the top of the staff.
Q. Is that so when the staffs are as high as you have indicated here as usual to railroads?
A. Yes sir.
66 Q. Now, did this particular brakestaff that you referred to, have anything of that kind on it?
A. It did not.
Q. Did it have anything on the end of the staff to hold the wheel?
A. Not a thing.
Q. Now, Mr. Friday, what was the distance from this rack or frame on this car 618 to the brakestaff?
A. Not to exceed 18 inches.
Q. Will you indicate, Mr. Friday, about the distance upon the floor here so that the jury can see you?
A. The staff was about that height, 18 inches; (indicating same with hand).
Q. Where did the brakeman stand, or where was he, or where did he have to be when he applied the brake?
A. On the outside of the rack between the rack and the end of the car.
Q. Was there any way for him to apply that brake by standing on the inside of the rack?
A. No sir.
Q. How high was the rack?
A. Well, I do not just remember the exact height, close to four feet, between that and five.
Q. What did the brakeman have to stand on when he was applying this hand brake?
A. He had to stand on the deck or floor of the car.
Q. There was nothing else for him to stand on except the deck of the car on the outside of the rack?
A. No sir.
Q. Do you remember about the rate of speed that you were going down that hill at that time?
A. About 25 miles an hour.
Q. Are there any curves going down that grade between there and Clark?
A. There is.
Q. Do you remember about how many?
A. There is four between the top of the hill and Clark.

Q. Do you know about what the degrees of the curves are, or do you call it degrees in railroading?

67 A. Yes, I think not to exceed four degree curves.

Q. What do you mean by four degree curves?

A. Well, I hardly know.

Q. What is about the highest degree of curves that cars can run on to be safe?

A. Well, I hardly know, I suppose they could run them on a ten degree curve.

Q. Now, you say the last time you saw the boy after you started down the hill, was when he was on this car 618?

A. Yes sir.

Q. Did you state at what place on the car he was?

A. Yes sir.

Q. What did you state?

A. I stated he was on the front end of the car, the north end.

Q. Where the brake was?

A. Yes sir.

Q. Now, how far did that train run before it stopped, from that point?

A. About five miles and a half from Williams Spur to where we stopped.

Q. Was your attention attracted to anything, or called to any particular matter at that place?

A. It was.

Q. What was it?

A. I was unable to locate the brakeman.

Q. What did you do then?

A. I set out the four rack cars of sheep, empty A. T. & S. F., gondola at Clark siding, and I took the engine and coach and caboose and went back to look for the brakeman.

Q. Who was on this engine, caboose and coach that went back to look for the brakeman?

A. The engineer R. H. Wolverton, Fireman A. Pino, and M. R. Ratliff, he was in charge of the sheep.

Q. And yourself?

68 A. Yes sir.

Q. State what you did and where you went after you started back from Clark.

A. Well, we started back looking for the brakeman, and at a point about three miles and a half south, as near as I can remember, we met the brakeman walking north, and we stopped and picked him up and proceeded to Santa Fe.

Q. What did you do with him when you picked him up?

A. We took him into the caboose and made down a bed for him to lay on.

Q. How far was that from Clark Spur, the point where you started down the hill—I mean Williams Spur?

A. Probably a little more than two miles.

Q. Did you notice anything in the appearance of the plaintiff that attracted your attention when you met him?

A. I did.

Q. What did you notice, Mr. Friday?

A. Well, he was covered with blood from head to foot; his lip was cut off and hanging down over his teeth, and his left arm was badly crushed.

Q. What was the appearance, if anything, as to loss of blood?

A. Well, from the general appearance, it looked as though he had lost a great deal of blood.

Q. You say he was put on the train; what did you do with him then?

A. Took him direct to Santa Fe.

Q. Did you stop for these rack cars on your way at Clark station, or not?

A. No sir.

Q. You left them there?

A. Yes sir.

69 Q. And you came in to Santa Fe; what time did you arrive here?

A. 7:15 P. M. if I remember correctly.

Q. That was in the evening?

A. Yes sir.

Q. Was it dark when you got here?

A. It was.

Q. I will ask you to state in that connection, whether it was dark when you picked him up?

A. It was, yes sir.

Q. Now, when you got here, what did you do with the plaintiff?

A. We brought the brakeman up to St. Vincent's Hospital here in Santa Fe.

Q. Do you know whether he received any surgical or medical aid?

A. Yes sir.

Q. Who was the surgeon?

A. Doctors Diaz and Massie.

Q. Do you know whether his arm was amputated?

A. It was the next morning.

Q. Do you know whether his lip was treated?

A. Yes, it was treated that night.

Q. Were you present when these operations and treatments were had?

A. I was.

Q. How long did he remain in the Sanitarium?

A. Nine days.

Q. Now, Mr. Friday, going back a little; how old was this boy at the time he got hurt?

A. Well, I could not swear as to his exact age.

Q. Well, within a year, if you can?

A. Nineteen years.

Q. Had he had any railroad experience previous to that time?

A. No sir, not to my knowledge.

70 Q. Who is this man John H. Friday, that is mentioned as the next friend of the plaintiff?

A. That is my father.

Q. Now, Mr. Friday, can you tell the jury who was the master mechanic of the Santa Fe Central Railway Company at the time, and for awhile before this injury occurred?

A. I can, Frank Zink.

Q. Where was he stationed, where was his place of business?

A. Estancia, New Mexico.

Q. That was his headquarters?

A. Yes sir.

Q. Do you know whether or not the master mechanic and the company, had ever had his or its attention called to any defects in the cars that you have mentioned?

A. Yes sir; on various occasions.

Q. How do you know that fact, Mr. Friday?

A. Why, I reported the condition of the cars myself.

Q. What condition did you report to the master machanic?

A. Well, as to the general condition of the cars as being defective.

Q. Do you know whether car 618 was included in that report?

Defendant objects; let him tell what cars were included in the report.

Objection sustained.

Plaintiff excepts.

Q. What cars were included in that report, or the reports to which you refer?

Defendant objects: "Your Honor, if reported in writing we would like to have the written report."

Objection overruled.

Defendant excepts.

71 A. Well, all rack cars that were in service at that time as to their general condition.

Q. Do you know whether rack car 618 was in service at that time?

A. It was.

Q. Now, Mr. Friday, do you know what became of that brakestaff and brakewheel that were on car 618 after this alleged injury?

A. Well, the brakewheel and staff was removed from the car.

Q. Do you know where it was taken to?

A. At the time it was put in the master mechanic's office at Estancia.

Q. How long after this accident was it until the brakestaff and brakewheel were removed from the car?

A. Why, I could not say just exactly, about—perhaps four or five months.

Q. Have you seen that car since that brakestaff and brakewheel were removed?

A. Yes sir.

Q. Did it have any brakestaff or brakewheel upon it?

A. Yes sir.

Defendants object as to the condition of the car since then and move to strike out the answer.

Objection sustained.
Plaintiff excepts.

Q. Do you know how long this boy had been out here before this accident occurred?
A. Not quite seven months.
Q. Do you know what wages he was receiving from the company at the time of the alleged injury?
A. Seventy-five dollars per month and over-time.
Q. What work or business had he been engaged in prior to entering the employ of the company?
A. He had been going to school.
72 Q. Do you know what his physical condition was up to the time of this alleged injury?
A. Good.
Q. What business, if any, has the plaintiff been engaged in since this accident occurred?
A. Not a thing.

Cross-examination.

Questions by Judge LAUGHLIN:

Q. How old are you, Mr. Friday?
A. Thirty-eight years old.
Q. And how long have you been engaged in railroad business?
A. Twenty-one years last March.
Q. As an employé of railroad companies all the time?
A. With the exception of about six months.
Q. What were the different positions you occupied as an employé of railroads.
A. Operator, agent, brakeman and conductor.
Q. Did you ever have any experience with reference to air brakes and their care except as a brakeman or conductor?
A. About thirty days outside of that.
Q. When was that?
A. That was, I think, in the spring of 1901.
Q. Where were you working at that time?
A. Ridgeway, Colorado.
Q. What company were you working for?
A. Well, it was joint Denver & Rio Grande and Rio Grande Southern.
Q. What was the condition of the brakewheel and brakestaff at the time this accident occurred?
A. Why, they were defective as to the brakestaff.
Q. Was the brakewheel on the brakestaff when you left Williams Spur that evening?
A. It was.
73 Q. Did you examine it yourself?
A. Why, I did not give it a personal examination any more than see the wheel was on the staff.
Q. How long prior to that time had you examined that particular wheel and brakestaff on car 618?

A. The day before.
Q. And where were you at that time?
A. In Estancia.
Q. When did you report the condition of that car?
A. I reported the condition of four of them on November 29, 1906, the day before the accident happened.
Q. To whom did you make that report?
A. To the car inspector at Estancia on that date.
Q. What was his name?
A. Joe Harris.
Q. And had you ever reported that car before that time?
A. I reported that among the rest of them.
Q. But not that particular car?
A. I cannot say that I ever pointed out that particular car separate from the rest of them.
Q. When you made that report to Harris on November 29, 1906, did you make a report in writing or verbally?
A. Verbal. I wish to correct that answer, I think it was on the 30th of November, if I remember right.
Q. Where did you pick up that car 618.
A. Estancia.
Q. Whose duty was it to select and pick up cars to make up a train?

'Plaintiff objects. It is immaterial whose duty it was.
Objection overruled.
Plaintiff excepts.

A. Why, the agent gives us a list as to the cars we should pick up.
74 Q. Who was the agent at that time in Estancia?
A. John P. Kennedy.
Q. Did you call his attention to the condition of car 618 at the time?
A. No, I think not.
Q. What was the particular report that you made to Harris as to the condition of car 618?
A. Defective air and defective brakestaff.
Q. Where is Harris now?
A. I do not know.
Q. Have you been conductor all the time since you entered the service of the Santa Fe Central Railway Company, the defendant?
A. No sir, not all the time.
Q. How long have you been conductor?
A. When I want to work here on the first day of June, I hired out as conductor.
Q. And you have been conductor ever since?
A. Well, I braked since, that when there was a reduction in the force.
Q. How long were you braking?
A. I can not say just exactly; sometimes I would be braking from ten to thirty days, then I would go running again.

Q. You were in the capacity of what is called extra conductor for a time?

A. For a time, yes.

Q. How long have you been a regular conductor?

A. A little over two years.

Q. And you are still employed in that capacity on defendant railroad?

A. Yes sir.

Q. Now, Mr. Friday, how far is it from Williams Spur to the top of the hill that you have designated as Clark hill?

A. It is located right at the top of the hill.

Q. And you made examination of the cars there?

75 A. I did.

Q. And you saw the plaintiff there on the car at that time?

A. At the time we started down the hill, yes.

Q. And you saw the condition of the brakestaff and brakewheel at that time?

A. Yes sir.

Q. On which car was the plaintiff when you last saw him at Williams Spur?

A. 618.

Q. Do you know the point where this accident occurred?

A. Just about.

Q. Now, how far is that north from Williams Spur where the accident occurred?

A. About one mile and between a quarter and a half.

Q. Do you remember what mile post it occurred at, or nearest one?

A. Right near mile post 32.

Q. Where does that count from?

A. From Santa Fe to Torrance.

Q. It counts south from Santa Fe?

A. Yes sir.

Q. How far were you from Williams Spur when you discovered that the plaintiff could not be found on the train?

A. Well, I do not know that he was missing until we stopped at Clark station. I was looking for him after we passed what is known as the dike.

Q. You say you were looking for him there, how were you looking for him?

A. I was looking to see if I could see him.

Q. In what position were you at that time when you were looking for him?

A. I was standing on the platform of the caboose.

76 Q. Was the coach then between you and the car 618?

A. No, the coach was at the rear of the train.

Q. What car was next to 618 toward the rear of the train?

A. 1012.

Q. What were these cars loaded with that night?

A. Sheep.

Q. Was it daylight or dark when you were looking for him from the platform of the caboose?

A. Just getting dusk.

Q. Did anything particular cause you to look for him?

A. No, I always make it a practice to look for any brakeman after we get down to the foot of the hill.

Q. Now, what speed was the train making when you came down that hill from Williams Spur to Clark station?

A. About twenty-five miles an hour.

Q. Did you keep any record of it?

A. No sir.

Q. Now, did you discover any difference in the speed of the train at any time coming down there?

A. Yes, the speed was greater on the hill than when we struck the flat.

Q. Now, where is this mile post 32 with reference to the flat you refer to?

A. Well, mile post 32 is just at the top of the first hill going south.

Q. And how far is that from the flat that you refer to?

A. Well, the flat I speak of is the foot of the hill about one mile.

Q. The speed was greater coming down the hill than after you struck the flat?

A. Yes, sir.

77 Q. And you stopped then at Clark station and looked for the brakeman, the plaintiff?

A. Yes sir.

Q. What did you do there, go back through the train?

A. No, I sent a fellow before we got to Clark front to the engine to see if the brakeman was on the engine; if he was not, I told the engineer to stop.

Q. Is the brakeman in the habit of getting on the engine?

A. Sometimes.

Q. Now, as a matter of fact, you do not know of your own knowledge where this accident occurred?

A. No, I could not say as to the exact spot.

Q. You have only been told by others as to where it occurred?

A. Yes, I seen what we thought was blood on the ties on the next trip that we went to work going south.

Q. How long after the accident occurred was it before you went to work again?

A. Two days, I laid off two days.

Q. Now, you have described the condition of the other cars; do you know anything about those matters personally, or is it from just general information?

A. I know it personally.

Q. What did you say the age of your brother, the plaintiff, is?

A. He will be 21 this fall.

Q. How old was he when the accident occurred?

A. A little past nineteen.

Q. Do you know of any rule or regulation with reference to employing minors by that corporation?

Plaintiff objects.
Objection overruled.
Plaintiff excepts.

78 (No answer.)

Q. Was there any brake call that evening coming down the hill, any signal given by anyone, by the conductor or the engineer?

A. There was no signal given, I told the brakeman to apply the brakes.

Q. What is the rule with reference to putting on brakes, as applicable to this railroad company?

A. Why, their rules state that you must set up retainers on all cars descending heavy grades.

Q. What do you mean by retainers?

A. Why, that is a valve that you set up retaining 15 pounds pressure in the brake cylinders while the engineer is re-charging the air; that is, 15 pounds retained in the brake cylinders while the engineer is re-charging the reservoir.

The court here adjourned until 2:00 o'clock P. M.

Pursuant to adjournment the court met at 2:00 o'clock P. M. Present, as of the morning session.

Cross-examination of E. E. FRIDAY continued.

Questions by Judge LAUGHLIN:

Q. Mr. Friday, is there any fixed rule for the height of brakestaffs?

A. Well, I cannot say that there is.

Q. How long had this brakestaff on this car 618 been in the same condition that it was at the time the accident occurred?

A. It was in that condition when I first came here.

Q. You had used the car all the time?

A. More or less, yes.

Q. You induced the plaintiff to take a job and learn railroading, did you not?

A. Why, I did to a certain extent, yes.

Q. Did you make an application for him for the position of brakeman?

A. No, he made the application himself.

79 Q. Did you vouch for him, or was it required that some one should vouch for him?

A. Why, I do not think it was necessary but I do not know, if I remember correctly, but what I signed his application blank with him.

Q. Do you know to whom he made the application for brakeman?

A. I think he made it to Mr. Grimshaw.

Q. Do you know how old he stated he was at that time?

Plaintiff objects as it is immaterial.
Objection overruled.
Plaintiff excepts.

Q. You made a report on the accident, did you not?
A. Yes sir.
Q. This is your signature, is it? (Witness handed paper.)
A. Yes sir.

By Judge LAUGHLIN: "Defendant here offers this paper and asks that it be marked defendant's Exhibit '1' for identification."

Q. Mr. Friday, do I understand you to say that the plaintiff was on car 618 where the accident occurred, at Williams Spur that evening?
A. He was after we started to leave the Spur, yes sir.
Q. And he was at the end of the car where the brakewheel was at the time, was he?
A. Yes sir.
Q. And how long had he been in the employ of the defendant company at that time?
A. Not quite seven months.
Q. You say you had been using this car whenever you needed cars all the time?
A. Yes, we would use them just as we needed them and just as they come.

80 Redirect examination.

Questions by Mr. PRICHARD:

Q. You stated, Mr. Friday, that you discovered this brakewheel on the brakestaff when you got to Clark station?
A. Yes sir.
Q. Now, state to the jury the condition of this brakewheel upon the staff, how it was upon the staff.

Defendant objects because the same is incompetent, irrelevant and immaterial.
Objection overruled.
Defendant excepts.

A. It was hanging down over the brakestaff.
Q. How was it hanging down on the brakestaff?
A. Well, it was hooked over the staff resting on the ratchet wheel which was on the bottom of the car.
Q. Now, this was at Clark station, as I understand?
A. Yes sir.
Q. And was after you saw the plaintiff on the car 618 just after you left Williams Spur?
A. Yes sir.
Q. In what position was this brakewheel with reference to the brakestaff at the time you left Williams Spur?
A. It was setting on top of the staff.
Q. But when you next discovered it, it was down over the staff and resting upon the ratchet wheel?
A. Yes sir.
Q. Now, explain to the jury, if you please, what you mean by the

ratchet wheel, where that is, and what it is, some of the jurors may not understand exactly what a ratchet wheel is in that connection?

A. Just a wheel fastened on the brakestaff which usually rests on the bottom or deck of the car, and it is full of notches, and in applying the brake you place a little lever with your foot against the ratchet wheel to keep the brake from flying back while applying it.

81 Q. Is that little trick that you put your foot against called by any other name by railroad men?

A. Yes, we call it a dog.

Q. Then you use your foot to place the dog in the notches of this ratchet wheel as the brake is turned, as I understand?

A. Yes sir.

Q. Now, do you mean to say that this brakewheel had fallen down over the staff, and was resting against the ratchet wheel at the bottom or on the platform of the car where the ratchet wheel was?

A. Yes sir, it was resting on the top of the ratchet wheel.

Q. Now this brakewheel you speak of, how is it so formed that it might fall down over the brakestaff and rest on this ratchet wheel below?

A. Well, the wheel is open with the exception of cross pieces running across from the outside to the center of the wheel in the form of a wagon wheel.

Q. Would there be any difficulty about that wheel dropping down over the brakestaff if it was removed from the top of the staff?

A. No sir.

Q. Now, you have stated that you have been in the railroad service for some years, I will ask you, taking into consideration the length of this brakestaff as you have described it, whether or not there would be any difficulty in applying the brakes, or the shoes of the brakes against the car wheels with the natural hands so as to perceptibly check the speed of the train?

Defendant objects on the ground that the question is clearly leading.

Objection overruled.
Defendant excepts.

A. Yes, I think there would be.

Defendant objects to answer.

82 By WITNESS:

A. I will change the answer to yes.

Q. Now, state your reasons for that answer?

A. With a short staff it would be almost impossible to get yourself in a proper position to apply the brakes to check the speed of the train.

Q. Do you mean in that connection with the hands upon the brakes, or what do you mean, hands upon the brakewheel, or what do you mean?

A. Yes, with the hands upon the brakewheel.

Q. Then, that being the case, what would you do and what was the custom in turning that brake upon that road coming down that grade, so as to get the proper purchase or more power against the wheels for the purpose of checking the speed of the train?

A. Well, they always used a brake club.

Q. What do you mean when you say, they always used a brake club?

A. We use a stick anywhere from three to four feet in length in applying the brakes while descending heavy grades.

Q. Why was that used?

A. In order to get the necessary power to apply the brakes in checking the speed of trains.

Q. Could the power have been had without that contrivance?

A. No sir, not with the condition that the brakes were in.

Q. Where were these contrivances obtained?

A. We would get them out of the store house at Estancia and get broken pick handles from the section foremen.

Q. Out of what storehouse?

A. The Santa Fe Central storehouse.

Q. You mean the storehouse of the defendant railroad company?

A. Yes sir.

83 Q. Now, how were these contrivances, these sticks applied to this brakewheel in order to increase the power of the hand brakes?

A. We would run it through the opening in the brakewheel so as to catch the brakestaff.

Q. And then what?

A. We would apply the brakes, set the brakes.

Q. Now, you speak here—I will ask you what you mean by retainers on these cars, so that the jury may understand what a retainer is?

Defendant objects as the witness has already explained that.

Objection overruled.

Defendant excepts.

A. Well, that is a valve supposed to be placed at a convenient place on each car for retaining fifteen pounds pressure on the braking power of each and every car that is properly equipped with automatic air, in descending heavy grades, while the engineer recharges the auxiliary reservoir.

Q. It is a power that can be used, as I understand you, while the engineer is re-charging the main reservoir?

A. No, while he is re-charging the auxiliary reservoir.

Q. Then that is what you mean by retainer?

A. Yes sir.

Q. Was there any retainer on this car 618?

A. No sir.

Q. When were these rack cars brought to Santa Fe, if at all, after this alleged injury?

A. Well, the cars were here the next morning, I could not say who brought them, they were here the next morning.

Q. You did not bring them up that evening?

A. No sir.
84 Q. But they were in the yards at Santa Fe the next day?
A. Yes sir.
Q. Did you see them?
A. Yes sir.
Q. Where did you see them?
A. I saw them in the yard right out of the Santa Fe Central station.
Q. In the city of Santa Fe?
A. Yes sir.

Recross-examination.

Questions by Judge LAUGHLIN:

Q. Mr. Friday, how large in diameter is that brakewheel?
A. Well, I could not hardly say; perhaps 16 to 18 inches.
Q. About the usual size of brakewheels, was it?
A. Yes sir.
Q. Now, you have said that car 618 had no retainer?
A. Yes sir.
Q. How many cars did you have in that train that night?
A. Seven.
Q. Did any of the other cars have retainers?
A. One.
Q. Was it one of the flat cars or the gondola?
A. A. T. & S. F., gondola.

HARRY S. FRIDAY, called by the plaintiff to testify as a witness in his own behalf, after being duly sworn, testified as follows:

Direct examination by Mr. PRICHARD:

Q. State your full name.
A. Harry Slocum Friday.
Q. Are you the plaintiff in this case, Mr. Friday?
A. Yes sir.
Q. Where do you reside?
85 A. In Santa Fe.
Q. How long have you been living in Santa Fe?
A. Well, off and on for three years ago next May.
Q. How long had you been living in Santa Fe prior to this alleged injury to yourself in this case?
A. Well, I came here in May that spring.
Q. What year?
A. 1906.
Q. State whether or not you entered the employ of the Santa Fe Central Railway company after your arrival here.
A. Yes sir.
Q. How long was it after you came here before you entered the employ of the company?
A. About two weeks I think.

Q. Do you remember the month that you entered the employ of the company?
A. Yes sir.
Q. What month?
A. I started to work the 13th day of May.
Q. In what capacity?
A. As brakeman.
Q. Do you remember where you were on the first day of December, 1906?
A. Yes sir.
Q. Where were you?
A. I was on train No. 2 going north to Santa Fe.
Q. From what place to what place were you going on that train?
A. Why, we started at Torrance and ended here.
Q. In what capacity were you on that train?
A. Brakeman.
Q. Were you in the employ of the Santa Fe Central Railway at that time?
A. Yes sir.
Q. Now, will you state whether anything of an unusual
86 occurrence took place on that day as affecting yourself?
A. Yes sir.
Q. What was it, Mr. Friday?
A. Well, I was thrown from the car and injured.
Q. What car were you thrown from?
A. 618.
Q. What train was *what*?
A. It was train No. 2.
Q. What kind of a car was this 618.
A. Well, it was a flat car built into a rack.
Q. At what point on the railroad did this thing occur?
A. I do not know that I can tell the mile, but I know about where it happened, it was on the other side of the flat.
Q. How far from Williams Spur to the north?
A. It was a little over a mile.
Q. What part of the road was the train running on at the time; was it on a level road or a grade down or up hill, or what?
A. It was on a grade, a heavy grade and right at the foot of a curve.
Q. Now, you say it was a heavy grade, was the train coming down or was it going up the grade?
A. It was coming down.
Q. You say it was right at the foot of the curve?
A. Yes sir.
Q. What were you doing at the time of this accident?
A. I was applying the brakes on 618.
Q. Will you describe about the length of the brake staff of the brakes to which you refer?
A. Well, they were between 15 and 18 inches high.
Q. What happened, if anything, while you were applying the brakes or brake?

A. Well, the wheel slipped off.

87 Q. What do you mean by the wheel slipping off, explain.

A. I had started to pull up the brake, and as I threw my weight on it, it lifted right off with me.

Q. That is, you mean the brake wheel lifted off of the brake staff.

Defendant objects to leading the witness.

Q. Now, state if you can why the wheel lifted off of the brake staff.

A. Well, where the wheel set, it was squared, that is, the shaft was squared and the wheel had a square hole in it to fit down over this, and the staff was tapered, and when I threw my weight on it, as there was no nut or anything to hold it on, it raised off and threw me.

Q. Where were you standing when this wheel raised off?

A. On the front of the car.

Q. On which end of the car was this brakestaff and brakewheel?

A. On the north.

Q. That is the end this way?

A. Yes sir.

Q. You were coming towards Santa Fe?

A. Yes sir.

Q. Now, I wish you would just rise there and show to the jury your position, your attitude, when this wheel came off?

A. Well, I was down like this pulling up on the brake when it raised off. (Illustrating position.)

Q. Did you have to stoop?

A. Yes sir.

Q. Why did you stoop?

A. Why, the staff was so low that I could not get at it any other way.

Q. What happened to you when this brakewheel slipped off of the staff?

88 A. Why, it threw me off.

Q. Where did you fall?

A. I fell on this side of the track.

Q. Did you fall on the right hand side of the track coming this way, or on the left hand side coming this way?

Defendant objects.

Objection overruled.

Defendant excepts.

A. I fell on the right hand side as we were coming north.

Q. Is that to the east or to the west?

A. It was to the east.

Q. Now, where did you strike, if at all, when you fell?

A. On a corner of a tie, struck right here, (indicating upper lip).

Q. What happened to you, if anything, when you struck?

A. Why, I could hardly say as to that.

Q. Did you discover whether you were hurt or not?

A. Well, I discovered that as quick as I got up.
Q. What did you discover when you got up?
A. Well, first the blood was running into my mouth, and I saw that I was bleeding in my face, and I must have been kind of dazed because I fell and struck this bone (indicating left arm) on a rail, and then I discovered that my arm was crushed.
Q. What do you mean when you say you struck this bone on a rail?
A. Well, the arm was cut across this way and mashed rather, and there was a bone protruding here, and I struck that as I fell. (Indicating by pointing to his arm.)
Q. Do you mean to say that you fell after you got up, or do you mean that this was the first fall?
89 A. After I got up.
Q. How long were you on the ground before you got up?
A. Well, I should judge I was there five minutes, not to exceed that.
Q. What did you do after you got up?
A. Well, I took my watch chain and tried to tie my arm up and that would not work.

Defendant objects to the witness going into what he did afterward.
Objection overruled.
Defendant excepts.

A. So I took a handkerchief and tied around my arm and took my knife and I twisted it up and gathered it up like this (indicating) and started out after the train.
Q. Had the train gone on?
A. Yes sir.
Q. And you started out after the train?
A. Yes sir.
Q. Where did you pass along after that, did you follow the railroad track, or did you take some other direction?
A. I followed the track.
Q. Do you remember whether you met the train or anyone upon that track?
A. Why, I met them coming back after me in the train.
Q. Where did you meet them?
A. Well, I could not hardly say, I was about down.
Q. What do you mean when you say you were about down, Mr. Friday?
A. Well, I had lost so much blood that I was weakening.
Q. From where were you losing the blood?
A. From my arm.
Q. How about your lip?
A. Well, that was bleeding freely.
90 Q. How were you feeling when you met the train, what was your condition?
A. I was pretty weak.

Q. When you met the train, what was done with you, if anything?

A. They picked me up and put me in the caboose and they made a bed for me and I laid down.

Q. State where you went from that point.

A. Why, we came in Santa Fe.

Q. And where did you go when you got to Santa Fe?

A. I was taken to the Sanitarium or hospital.

Q. Was there a surgeon or a physician called in to examine your wounds?

A. Yes sir.

Q. Do you remember who that was?

A. Well, when I got in here I was just about gone.

Q. You do not remember much about when you arrived?

A. No sir.

Q. Do you remember whether or not there was any operation upon your person after that?

A. Why, I do not remember when it took place.

Q. You do not remember when that was?

A. No sir.

Q. How long were you in the hospital, Mr. Friday?

A. Why, if I remember correctly, I was in there nine days..

Q. Do you remember whether or not you had lost your arm when you left the Sanitarium?

A. Yes sir.

Q. Do you remember whether or not anything had been done to your lip?

A. Yes sir.

Q. What was it?

A. Well, it was sewed up.

Q. Mr. Friday, had you ever had any railroad experience prior to entering the employ of the Santa Fe Central Railroad company?

A. No sir.

Q. Had you prior to this alleged injury worked upon this car 618?

A. I do not remember.

Q. Do you remember whether or not you called the atten-
91 tion of the car repairer or the master mechanic, to the fact that this car was defective?

A. I could not say as to this particular car.

Q. Well, what did you do in that respect, if anything?

A. I made out a list one morning at Torrance and handed it to the car repairer at Estancia.

Q. List regarding what?

A. Well, as regarding the wheels and the air and the hot boxes.

Q. Regarding what cars?

A. Well, they were rack cars, but I could not say what numbers.

Q. How many rack cars did that company have at that time?

Defendant objects on the ground that it is not necessary to go into the number of rack cars.

Objection overruled.

Defendant excepts.

A. Well, I do not know how many.
Q. Can you say, more or less?
A. Yes sir.
Q. Well, how many, more or less?
A. Well, I should judge they had about forty or forty-five.
Q. What were their condition as to whether the condition of the cars was similar in respect to their brakes and other appliances connected therewith?

Defendant objects because the same is incompetent, irrelevant and immaterial.
Objection overruled.
Defendant excepts.

A. Well, they were more or less in bad order.

Defendant objects, as that is a matter for the jury to determine whether they were in bad order or not, and moves to strike out the answer.
Objection overruled.
Defendant excepts.

Q. Now, how was it with regard to these rack cars all having short brakestaffs or long brakestaffs?

Defendant objects because it is leading.
Objection overruled.
Defendant excepts.

A. They were different lengths.
92 Q. Explain to the jury what you mean by different lengths?
A. Well, some were short and some were longer.
Q. How short were the shortest?
A. I should judge about eleven inches.
Q. How long were the longest on these rack cars?
A. Well, some of them were, Oh, about two feet.
Q. How long was the brakestaff on this car 618?
A. Well, between 15 and 18 inches.
Q. Was there any other position that you could have taken when you applied that brake going down that hill, than the position you did take in applying the brake?

Defendant objects; that is a matter for the jury; let him state what he did do and what he didn't do.
Objection overruled.
Defendant excepts.

A. No sir.
Q. What care, if any, did you exercise in the applying of that hand brake at that time?
A. Well, I exercised all the care that I could do.
Q. What do you mean by that?
A. I swung into the car instead of swinging away as I could have done.

Q. State whether or not you applied the brake differently from your custom of applying brakes going down that grade?
A. No sir.
Q. Which side of the center of the car, if either, was this brakestaff?
A. I do not remember as to that.
Q. Which side of the brakestaff were you standing?
A. On the right side.
Q. Why were you on the right side?
A. Because the brake turned to the right.
Q. State whether or not that was the proper side for you to stand on in turning the brake?
A. Yes sir.
Q. Now, when did you begin to apply that brake, Mr. Friday, as you started down the hill?
A. After we tipped over the hill.
Q. How long were you applying that brake before the wheel slipped off of the brakestaff?
A. I could not say.
93 Q. Well, more or less?
A. Well, I drawed it up with my hands as tight as I could, and then inserted the club and started to draw it up with that, and it came off.
Q. Why did you insert the club?
A. To get more pressure.
Q. Why did you need more pressure?
A. Well, to keep the train under control.
Q. Do you remember about what rate of speed the train was running when you were thrown from the car?
A. Well, I was not much of a judge, but I should judge between 20 and 30 miles an hour.
Q. Can you state to this jury about the distance you covered from the time you began to apply the brakes until you were thrown from the train?
A. About three-quarters of a mile.
Q. Can you state to the jury whether the train was increasing in its speed or not during that three-quarters of a mile?
A. Yes sir.
Q. Well, what was it?
A. It was increasing, getting much faster.
Q. Mr. Friday, what was the condition of your health at the time this accident occurred?
A. I considered it all right.
Q. Did you have any bodily ailments or infirmities that you know of?
A. No sir.
Q. What were you getting from the railroad company for your services as brakeman when this trouble occurred?
A. I was getting seventy-five dollars a month and over-time.
Q. What do you mean by over-time?
A. Well, after ten hours' work, we got 25 cents an hour.

Q. Have you been doing any railroad work since that time?

94 A. No sir.

Q. Why?

A. I was disabled.

Q. Do you know whether or not the rules of the company preclude you from employment by the company since your accident?

A. I do not.

Q. You have not examined the rules?

A. No sir, I never studied them.

Q. What have you been doing, if anything, since this accident occurred?

A. Nothing to amount to anything.

Q. Have you been able to earn any money by manual labor since this injury occurred?

A. No sir.

Q. Will you show to the jury the point where your arm was amputated? Just stand up so the jury can see.

(Witness exposes arm and shows it to the jury.)

Q. State whether or not, Mr. Friday, you had any other occupation or business than railroading, or manual labor upon which you could depend for a living at the time this accident occurred.

A. No sir.

Q. Have you any other occupation or business now other than manual labor to depend upon for a living?

A. No sir.

Q. You have no profession, no other occupation?

A. No sir.

Cross-examination.

(Questions by Judge LAUGHLIN:)

Q. How far north of Williams Spur were you when you applied the brake on car 618?

A. Just after we tipped over the hill.

Q. About how far is that?

95 A. About 200 yards, I should judge.

Q. Was it daylight or dark when you left Williams Spur?

A. Well, it was not dark, it was dusk, or getting dusk.

Q. What kind of weather was it?

A. If I remember correctly, it was cloudy or partly cloudy.

Q. Was it raining?

A. Why, it started to misting after we started down the hill.

Q. Then how far had the train gone after you applied the brake until you say the brakewheel slipped and you fell?

A. Well, I should judge about three-quarters of a mile.

Q. And what speed was the train making?

A. Between 20 and 30 miles, I could not say exactly.

Q. Had the train signalled brakes at that point where you applied the brake?

A. No sir.

Q. Who were the physicians who attended you during the nine days you were at the Sanitarium?

A. Doctors Massie and Diaz.

Q. Did any doctor meet you at the depot that night when you got into Santa Fe?

A. I do not remember.

Q. Did Doctor Massie attend you during the entire nine days?

A. I do not remember whether he did or not.

Q. Was Dr. Diaz the physician for the Santa Fe Central Railway Company at that time?

A. I believe assistant.

Q. Who was the principal physician and surgeon of the defendant company at that time?

A. Dr. Norris of Estancia was chief surgeon.

96 Q. Did he attend you during your illness?

A. I think he came to see me once.

Q. Did you make a report of the accident?

A. I did.

Q. Is this the report and this your signature? (Witness handed paper.)

A. Yes sir.

Defendant here offers paper and asks that same be marked Defendant's Exhibit "2" for identification.

Q. Where were you living, Mr. Friday, prior to the time you came to Santa Fe and took employment with the defendant company?

A. At Steele City, Nebraska.

Q. And how long had you been in Santa Fe before you secured employment with the defendant company?

A. I should judge about two weeks.

Q. Did you make a formal application to the company for the position as a brakeman?

A. I did.

Q. Is this the application and is that your signature? (Witness handed paper for examination.)

A. Yes sir.

Defendant offers this paper for identification only and asks that it be marked Defendant's Exhibit "3."

Q. On that application did you apply to the surgeon of the company for examination?

A. I was given an order for examination, yes sir.

Q. Were you examined?

A. Yes sir.

Q. Did you fill out or answer the questions in the surgeon's certificate blank?

A. I answered them, yes sir.

Q. I will ask you if that is the one and if that is your signature? (Witness handed paper.)

A. Yes sir.

Q. This was the doctor, John L. Norris?
97 A. Yes sir.

Defendant offers this for identification, and asks that it be marked Defendant's Exhibit "4."

Q. Did you make application for insurance in the United States and Guaranty and Fidelity Company of Baltimore, Maryland?

Plaintiff objects to that line of testimony.
Objection sustained at this time.
Defendant excepts.

Q. How old were you, Mr. Friday, December 1, 1906?
A. I was nineteen.
Q. I see in your application for employment you gave your age as 21 years?

Plaintiff objects because that application is not in evidence and the gentleman cannot use it for any purpose until it is before the court as part of the evidence in this case.
Objection sustained.
Defendant excepts.

Q. How long was that brake club you were using that night?
A. Well, it was about 30 inches, I should judge.
Q. What kind of a stick was it?
A. It was a pick handle.

Redirect examination.

(Questions by Mr. PRICHARD:)

Q. Where did you get that pick handle?
A. Well it was on the train, I do not remember where we did get it.
Q. You mean it was on the train when you went on the train to work?
A. I do not remember whether I drew it out of the house or not.
Q. What house do you refer to?
A. The Santa Fe Central warehouse at Estancia.
98 Q. Is that where they got those pick handles?
A. Yes sir.
Q. Were they used generally by brakemen upon that railroad?
A. Yes sir.
Q. All the brakemen used them?
A. All that I ever knew.

Recross-examination.

(Questions by Judge LAUGHLIN:)

Q. Where were you with reference to car 618 when you were at Williams Spur?
A. Well, we got down and went along and looked at the air, and I think I got upon the car to be ready to set the brakes when we started.

Q. Now, when you say "we," who do you mean?
A. The conductor and myself.
Q. Who was the conductor?
A. E. E. Friday.
Q. What relation is he to you?
A. He is a brother.
Q. You were working under his instructions, were you?
A. Yes sir.
Q. Had you ever seen that brakestaff before that time?
A. Probably I had but never noticed it particularly.
Q. Had you ever worked on that particular car before.
A. I do not remember.
Q. Do you remember any particular car that you ever did work on during the seven months you were employed there as brakeman?
A. Only the coaches and the cabooses.
Q. Did you notice the brakestaff and brakewheel on car 618 while you were at Williams Spur?
99 A. I do not remember whether I did take any particular notice or not.
Q. But you got on to the car there and remained until you applied the brake?
A. I thought I did.
Q. Which side of the car did you say that the brakewheel and brakestaff are?
A. I do not remember.
Q. You do not remember whether it was on the west side of the car or the east side of the car assuming that the railroad runs north and south.
A. I do not.

CARLOS VIERA, called as a witness on behalf of the plaintiff, after being duly sworn testified as follows:

Direct examination.

(Questions by Mr. PRICHARD:)

Q. Mr. Viera, will you state your full name?
A. Carlos Viera.
Q. Where do you reside, Mr. Viera?
A. Santa Fe.
Q. How long have you been residing here?
A. About four years.
Q. Were you residing here on or about the first of December, 1906?
A. Yes sir.
Q. What business or occupation were you engaged in at that time?
A. Photographer.
Q. Are you still in the photographing business?
A. Yes sir.
Q. Do you remember, Mr. Viera, whether you had an occasion to take photographs of some cars at the Santa Fe Central Railway depot?

A. Yes sir.

100 Q. Do you remember the date that these photographs were taken?

A. About the date I am not certain now, I made a note, but within a day or two.

Q. Well, you state that date as you remember it.

A. It was either on the 2nd or 3rd of December, 1906.

Q. Where did you take these photographs?

A. They were taken at the depot where the cars stopped.

Q. State whether or not you afterwards produced the photographs or negatives, or whatever you call it?

A. Yes sir.

Q. These were photographs of what?

A. I took three photographs, one of the brake rods, I guess they call them brake rods, and the brakewheel, and one of the car showing the number of the car.

Q. Now, did you finish these photographs?

A. Yes sir.

Q. What did you do with them when you finished them?

A. I turned over, I believe, two copies of each to Mr. Friday.

Q. What Friday was that?

A. It was the defendant's father.

Q. You mean the plaintiff's father?

A. Yes sir.

Q. Would you recognize those photographs now if you were to see them?

A. Yes sir.

Q. I wish you would look at these photographs, each of the three photographs which I hand you, and state whether or not they are the photographs to which you refer?

A. They are, and I have proof of that, I have proof of the negatives I made the other day.

101 Plaintiff asks that these photographs be marked for identification Exhibits "A," "B" and "C."

Cross-examination.

(Questions by Judge LAUGHLIN:)

Q. When did you say you took these photographs?

A. At the Santa Fe Central depot.

Q. I said when?

A. Well, I believe it was about the 3rd of December, I am not sure.

Q. Of what year?

A. 1906.

Q. About the 3rd of December, 1906?

A. I believe so, as near as I can remember.

Q. At whose instance did you take the photographs?

A. Mr. Friday had me go down there.

Q. The father of the plaintiff you say?

A. Yes sir.

Redirect examination.

(Questions by Mr. PRICHARD:)

Q. For the purpose of identifying this Mr. Friday, I would ask you whether he is a conductor on the railroad, or whether it is the father of the plaintiff?

A. I am not sure, it is an elderly gentleman.

EDGAR N. PEDEN, called as a witness in behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

(Questions by Mr. PRICHARD:)

Q. State your full name.

A. Edgar Nelson Peden.

Q. Where do you live?

A. In Estancia.

Q. How long have you lived there?

102 A. The 27th of August a year ago.

Q. What is your business or occupation?

A. Master Mechanic of the Santa Fe Central Railroad.

Q. How long have you been Master Mechanic of that road?

A. It is a year ago the 27th of August.

Q. Mr. Peden, were you subpœnaed to bring into court a certain brakestaff which was in the shops of the Santa Fe Central Railway Company, or in your possession as Master Mechanic?

A. Yes sir.

Q. Did you bring to the city of Santa Fe the brake staff?

A. Yes sir.

Q. Where is it now?

A. Right around here.

Q. Will you produce it? (Witness produces brake staff and hands same to Mr. Prichard.)

Q. Is this the brakestaff which I hold in my hand to which you refer?

A. Yes sir.

Q. This is the brakestaff that you brought with you?

A. Yes sir.

Q. Where did you get it?

A. In the storeroom at Estancia.

Cross-examination.

(Question by Judge LAUGHLIN:)

Q. Do you know anything about where that came from, Mr. Peden?

A. No sir.

Redirect examination.

(Questions by Mr. PRICHARD:)

Q. You were also subpœnaed, were you not, to bring with you a brakewheel of a staff?

103 A. Not that I know of.

Q. You were subpœnaed to bring a brakewheel?

A. A brakestaff and a brakewheel.

Q. I see the brakewheel is not here, can you explain that?

A. I cannot, there was no brakewheel with the staff when I got it.

Q. Did you look for the brakewheel?

A. Yes sir; I looked through the storeroom for a brakewheel that I thought should belong to it, but could not find it.

Q. Did you bring this staff from the storeroom?

A. Yes sir.

Q. And you say you looked for the brakewheel and could not find it?

A. Yes sir.

E. E. FRIDAY recalled to the witness stand by the plaintiff.

Direct examination.

(Questions by Mr. PRICHARD:)

Q. Mr. Friday, in your former testimony you referred to a brakestaff upon car 618; will you state whether or not you are able to identify or would be able to identify that brakestaff?

A. Yes sir.

Q. By what means could you identify it?

A. By certain marks.

Q. What kind of marks?

A. Well, the initials E. E. F. on it.

Q. Who placed them there?

A. I did.

Q. Look at this brakestaff, or whatever you call it, and state whether you have ever seen that staff before.

(Witness examines staff.)

A. Yes sir.

104 Q. Do you see upon that staff the marks to which you refer?

A. Yes, sir.

Q. What are those marks?

A. E. E. F.

Q. Now, state whether or not that is the brakestaff that was upon car 618 at the time of the alleged injury to the plaintiff.

A. Yes, sir.

Q. What do you *dominate* this wheel to which I am pointing now?

A. Ratchet wheel.

Q. Is that the ratchet wheel to which you referred in your testimony on a former occasion?

A. Well, it looks very much like it.

Q. Point out to the jury what portion of that brakestaff, if any, stood above the platform of the car.

A. That portion from the top of the staff down to the bottom of the ratchet wheel. (Indicating same with finger.)

Q. Now, state to the jury whether or not the top of that brakestaff there is in the same condition that it was at the time of the alleged accident.

A. It is.

Q. You spoke also of a brakewheel that rested upon this brakestaff; now, state how it rested upon that brakestaff.

A. It fit right down over the top of the staff.

Q. Mr. Friday, I wish you would look at these things that I hand you and tell the jury whether you have ever seen them before. (Witness handed photographs.)

A. I have.

Q. When did you first obtain possession of those pictures in your hands?

A. Three or four days after the accident occurred.

Q. What are they pictures of?

105 A. They are pictures of brakestaff and the brakewheel on Santa Fe Central car 618, and brakestaff on Santa Fe Central 621.

Q. When did you get into possession of them?

A. Well, immediately after they were taken.

Q. By whom were they taken?

A. By Mr. Viera.

Q. And in whose possession have they been since they were turned over to you.

A. My own.

Q. All the time?

A. Yes, sir, with the exception that I believe I gave them to you yesterday or the day before.

(Photographs returned to Mr. Prichard.)

Q. Do you identify these pictures as photographs of car 618 and car 621, and brakestaff and brakewheel of car 618?

A. Yes, sir.

Q. Is this the same car to which you have been referring in your testimony?

A. It is.

Plaintiff offers this brakestaff for identification and asks that it be marked Exhibit "D."

Plaintiff here offers the brakestaff in evidence to the jury.

Defendant objects because the same is irrelevant, incompetent and immaterial.

Objection overruled.

Defendant excepts.

Plaintiff now offers in evidence the photographs marked Exhibits "A," "B" and "C."

Defendant objects to the offer of these photographs because the same are irrelevant, incompetent and immaterial, and they include another car which is not the car upon which the accident is alleged to have occurred.

106 Objection overruled.

By the COURT: They will be admitted as to car 618.

Defendant excepts.

Q. Mr. Friday, state what car this represents to which I am pointing?

A. Santa Fe Central 618.

Q. Is that the car to which you have been referring as 618 in this testimony?

A. It is.

Q. Indicate if you can, where the brakestaff is on this car to which you have been referring?

Defendant objects because the photograph itself shows.

Objection overruled.

Defendant excepts.

Q. Make a mark there so as to distinguish it by a small cross.

(Witness marks photograph.)

Q. Now, what is this object that seems to be below the brakestaff?

A. Brakewheel.

Q. State whether or not that is the brakewheel that you said hung down over the brakestaff.

A. It looks very much like it.

Q. Will you indicate that spot by some mark; indicate by one long and two short marks.

(Witness marks photograph as directed.)

Plaintiff now offers this picture in evidence.

Q. Now, look at this picture which I hold in my hand and tell us what this picture is marked with a cross?

A. That is the front, north end of Santa Fe Central 618.

Q. Is that the same 618 that you have been referring to in your testimony?

A. It is.

107 Q. Now, look at this object marked "A" and tell the jury what that is?

A. Brakestaff.

Q. State whether or not it is the same brakestaff that has been offered in evidence as Exhibit "D?"

A. It is.

Q. Here is another object below marked "B," what is that?

A. That is a brakewheel.

Q. State what wheel that is with reference to the testimony of wheel on brakestaff of 618.

A. It looks very much like the same one.
Q. Were you present when these photographs were taken?
A. Yes, sir.
Q. And you identify that as the end of car 618, do you?
A. Yes, sir.

Plaintiff offers photograph in evidence as Exhibit "B."
Defendant objects because the same is irrelevant, incompetent and immaterial.
Objection overruled, and the exhibit is admitted in evidence so far as it relates to car 618.
Defendant excepts.

Q. Here is another picture which I hold in my hand marked Exhibit "C." Will you state what this object is on the picture marked with a cross?
A. It is the north end of Santa Fe Central car 618.
Q. The same car that you have been testifying about?
A. Yes, sir.
Q. Here is an object on this picture marked "A." What does that represent?
A. Brakestaff.
Q. What brakestaff is that with reference to the one that is offered in evidence?
108 A. The same one.
Q. Here is another object on this picture marked "B," what is that?
A. That is a brakewheel.
Q. On what car?
A. On Santa Fe Central 618.
Q. What brakewheel is that?
A. It looks very much like the same one that was on there at the time of the accident.

Plaintiff offers that in evidence and asks that it be marked as Exhibit "C."
Defendant objects to the offer of Exhibit "C" on the ground that the same is irrelevant, incompetent and immaterial.
Objection overruled, and the exhibit will be admitted so far as it relates to Car No. 618.
Defendant excepts.

Cross-examination.

(Questions by Judge LAUGHLIN:)

Q. Mr. Friday, when did you come into possession of that brakestaff?
A. I have never had possession of it.
Q. Who has had possession of it?
A. I could not say.
Q. Do you know when it was removed from the car 618?
A. I know about what time.
Q. When was that?

A. About four or five months after the accident.
Q. Who removed it from the car?
A. I could not say.
Q. Do you know why it was removed?
A. It was removed by order of the court.
Q. How long after it was removed by order of the court, was it before you saw it the first time?
A. About seven or eight days ago.
109 Q. Do you know on whose application the court ordered it removed?

Plaintiff objects on the ground that it—not necessary to go into these things.
Objection overruled.
Plaintiff excepts.

A. Well, I do not know just how to explain it; a subpœna was got out by Colonel Prichard.
Q. And under that subpœna it was removed from the car?
A. Yes, sir.
Q. Do you know who removed it?
A. No, I do not.
Q. And you do not know in whose possession it has been since?
A. No, I could not say.
Q. Who ordered these photographs taken?
A. Myself and father.
Q. Do you know when they were taken?
A. I do not remember just exactly, between four and five days after the accident, I could not say exactly.

Redirect examination.

(By Mr. PRICHARD:)

Q. Now I will ask you when were these marks, "E. E. F." placed on this brakestaff by you, with reference to the time that the brakestaff was removed from the car?
A. I cannot tell you just how long, it was done within two days of the time the accident happened.
Q. Were these marks upon this brakestaff when it *it* was taken from the car?
A. Yes, sir, the marks have been on there ever since.
Q. I believe that you say that you put these marks on
110 about two or three days after the accident: now, I will have you, if you please, point out those marks?

(Witness pointed them out to the jury.)

Q. How did you put them on?
A. Put them on with an initial punch.
Q. Point out now to the jury where these initials are, "E. E. F."?

(Witness points out marks as brakestaff is handed to each member of the jury.)

ROBERT TAYLOR, called as a witness in behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

(Questions by Mr. PRICHARD:)

Q. Mr. Taylor, state your full name, will you?
A. Robert Taylor.
Q. Where do you live, Mr. Taylor?
A. Estancia.
Q. How long have you been living there?
A. Four years last July.
Q. State whether or not you have ever been in the employ of the Santa Fe Central Railway Company?
A. Yes, sir.
Q. How long have you been employed?
A. A little over five years.
Q. In what capacity?
A. I was employed as blacksmith.
Q. When were you first employed as blacksmith of the company?
A. It was in 1903, the 27th day of May.
Q. Where?
A. In Torrance.
Q. State whether or not you became familiar with the rolling stock of that company at that time and subsequently?
A. Well, right at the time I was not so well acquainted with it, as I worked in the shop and all the work was brought right in to me.
111 Q. Did you afterwards become more or less familiar with it, or not?
A. Yes, sir.
Q. State whether or not you had occasion to do anything with the brakestaffs upon any of the cars of the company?
A. Oh yes, I have repaired lots of them.
Q. What do you mean by repairing?
A. Well, in case they were broken or they wanted changing in in any way.
Q. How about the lengthening or shortening?
A. Yes, I did lengthening or shortening.
Q. Do you remember car known as rack car 618?
A. Well, I know that they got a car of that number, I saw it around the yards.
Q. Do you remember whether or not you did any work on that car?
A. Well, I could not say that particular car, but I suppose I have, I would not say that I have, there is lots of times I did not get the number of the car.
Q. What did you do, if anything, with reference to the brakestaffs of these cars?
A. Why, some of them I shortened, some of them I lengthened.
Q. Did you lengthen any of the brakestaffs on the rack cars?
A. Yes, sir.

Q. Did you shorten any of the brakestaffs?
A. Yes, sir; it was not a rack car at the time.
Q. They were afterwards converted into rack cars?
A. Yes, sir.
Q. At the time they were probably flat cars?
A. Yes, sir.
Q. Now, state to the jury what you did, and how you did it in shortening the brakestaffs of these cars.
A. Just cut them off, and squared the ends and fitted the brakewheel.
112 Q. Then what did you do in the matter of fitting them for the brakewheel?
A. Well, of course, just squared them on the end like that, that is, some of them I drawed out on the end and put a nut on.
Q. Some of them you put nuts on?
A. Yes, sir.
Q. You did not put the nuts on all of them?
A. No, sir; some of them we cut off for certain purposes.
Q. Now, under whose direction were you working then?
A. J. W. Records.
Q. Who is Records?
A. He was master mechanic at the time.
Q. Master mechanic, was he?
A. Yes, sir.
Q. Was Mr. Records asked anything by you as to whether these brakestaffs should have threads and nuts put on them?

Defendant objects as to what Mr. Records may have been asked, and further objects to a conversation as between this witness and Mr. Records at the time, and it is not shown when this conversation took place or anything about it.
Objection sustained to the question as it now stands.
Plaintiff excepts.

Q. How many brakestaffs did you cut off?
A. I do not remember. I did not cut off all of them.
Q. How many did you cut off, more or less?
A. Well, probably six or eight, may be a dozen, I do not know how many. I do not know how many cars have got short brakestaffs.
Q. What cars did you cut the brakestaffs off of?
A. I did not see the numbers.
113 Q. Well, the character?
A. Flat cars.
Q. Under whose directions, if anybody's, did you cut these brakestaffs off?

Defendant objects because it is not shown that he cut this particular brakestaff off, as he says that he did not cut them all off.
Objection overruled.
Defendant excepts.

A. Mr. Records, Mr. J. W. Records.

Q. What was he at that time, what was his relation to the company?
A. Master Mechanic.
Q. For whom?
A. Santa Fe Central.
Q. Are you in the employ of the company now?
A. Yes, sir.
Q. I want to ask you the question direct whether or not you did not cut brakestaff off of car 618?

Defendant objects.
Objection overruled.
Defendant excepts.

A. I cannot say.
Q. Why cannot you say?
A. There is lots of brakestaffs cut off of cars that have not got the number on.
Q. Now, as a matter of fact, have you not already said at another time and another place that you cut off the brakestaff of car 618?
A. No.

Defendant objects because the question is leading.

Q. You did not?
A. No.
Q. Now, do you say to the jury that you did not cut this brakestaff off of car 618?
A. No.
114 Q. You know, do you not, that brakestaff on 618 was cut off?

Defendant objects because the question is leading.
Objection overruled.
Defendant excepts.

A. No, I could not say that the brakestaff on 618 was cut off.
Q. Why cannot you say it?
A. I was not the car inspector.
Q. Well, you saw this car, didn't you?
A. Yes sir.
Q. You saw 618?
A. Yes sir.
Q. You saw it often?
A. Oh, yes.
Q. Now, you say to the jury that you cannot say whether brakestaff was cut off on 618 or not?
A. No sir.
Q. Can you mention any rack car by number on which the brakestaff was cut off?
A. No.

Cross-examination.

(Questions by Judge LAUGHLIN:)

Q. Mr. Taylor, when did you and Mr. J. W. Records have the conversation to which you have referred?
A. It was in 1903.
Q. How long since Mr. J. W. Records left the employment of the Santa Fe Central Railway company, defendant?
A. I think it has been about three years, something like that.

Defendant moves to strike out all the testimony with reference to the conversation between this witness and J. W. Records as Master Mechanic, because the same was three years prior to the time the accident occurred.

115 The court allowed testimony in regard to whose orders the brakestaffs were cut off to stand. Motion overruled.
Defendant excepts.

The court here adjourned until ten o'clock A. M. September 17, 1908.

Pursuant to adjournment the court met at ten o'clock A. M. September 17, 1908.
Present, as of yesterday.

ROBERT TAYLOR recalled to the witness stand by plaintiff.

By Mr. PRICHARD:

Q. Mr. Taylor, do you know whether there were any changes made on the brakestaffs of these cars, including car 618, between the time that you worked on them in cutting off the brakestaffs, and the first day of December, 1906?

Defendant objects unless question is confined to car 618.
Objection overruled.
Defendant excepts.

A. Well, I worked on the brakestaffs and lengthened them out and I could not say about 618, I did not get the number of all the cars that came in.

Question by one of the jurors:

Q. I wanted to ask him whether or not it was by the direction of the Master Mechanic that he failed to put any threads on the tops of these brakestaffs.

Defendant objects unless question is confined to car 618.
Objection overruled.
Defendant excepts.

A. Well, I asked Mr. Records when I cut those brakestaffs off——

Defendant objects.
116 Objection overruled.
Defendant excepts.

A. (continued): If he wanted a thread put on the brakestaff and a nut put on, and he told me "no" it was not necessary. That special car 618 I could not say because I did not get the number of any cars I was working on at that time.

Defendant moves to strike out the answer of the witness, first, because it relates to a conversation between himself and Mr. J. W. Records, which occurred some three years before the accident; and second, because the same is irrelevant, incompetent and immaterial.

By Judge LAUGHLIN: "I want to ask a question of a juryman."

Court permits question to be asked.

Q. Mr. Nutt, were you talking to Mr. E. E. Friday in front of the court house this morning?

A. Yes sir.

Q. Mr. Friday, the brother of the plaintiff and principal witness in this case?

A. Yes sir.

By the COURT:

Q. Concerning this case?

A. No sir.

Q. Any relation to this case?

A. No sir.

By Judge LAUGHLIN: "I submit, if the court please, that it is highly improper for one of the jurors to go around and make acquaintance of one of the principal witnesses in this case, and defendant takes an exception to the juror talking to Mr. E. E. Friday, who has testified in this case, and who is really the principal witness."

By the COURT: "I will admonish the jurors not to have any conversation with anyone regarding this case."

117 By Judge LAUGHLIN: "Defendant objects to anyone of the jurors talking to any of the witnesses on any subject whatever, as Your Honor has clearly instructed them previously.

By Mr. PRICHARD:

Q. Mr. Nutt, you say that you had nothing to say to Mr. Friday concerning this case?

A. No sir.

Q. Did you allude to the case?

A. No sir.

By Judge LAUGHLIN:

Q. But you did talk to Mr. Friday, brother of the plaintiff and one of the principal witnesses in the case, and who testified before you on the stand at least two times?

A. Yes sir.

Q. You did talk to Mr. E. E. Friday this morning?

A. Yes sir.

Q. That is out on the lawn in front of the court house?

A. Yes sir, it was on the lawn in front of the court house where

everybody could hear us. He was asking me about an engineer on the Rio Grande Southern by the name of Ellis Roberts, and I told him the best I could about the engineer he was asking me about.

M. JAMES DEMIER called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

(Questions by Mr. PRICHARD:)

Q. State your full name.
A. M. James DeMier.
Q. Where do you reside, Mr. DeMier?
A. Santa Fe.
Q. How long have you been living in Santa Fe?
A. Six or seven years.
Q. What business or occupation are you engaged in at this time?
A. Railroading.
Q. How long have you been railroading?
118 A. The last four years.
Q. Where have you been railroading?
A. With the Santa Fe Central.
Q. That is the defendant in this case?
A. Yes sir.
Q. In what capacity have you been railroading, Mr. DeMier?
A. As conductor and brakeman.
Q. Are you familiar with the rolling stock of that road?
A. Yes sir.
Q. Are you familiar with car known as car 618, rack car?
A. Yes sir.
Q. How long have you known that car?
A. Well, it has been in service ever since I have been on the road.
Q. Now, were you familiar with the condition of the brakestaff and brakewheel on that car prior to the first day of December, 1906?
A. Well, I did not pay any particular attention to that one car or the condition it was —.
Q. Can you state to the jury what the condition of the brakewheel and the brakestaff of that car was about that time?

Defendant objects because the question is not limited to any year or any particular time.
Objection overruled.
Defendant excepts.

A. Yes sir.
Q. How long had it been prior to this first day of December, 1906, when you last saw the car, if you remember?
A. I could not state exactly.
Q. No, I did not expect you to state exactly, but approximate it?
A. Well, I handled the same car off and on myself on trains.

By the COURT:

Q. Do you refer to 618?

A. Yes sir.

By Mr. PRICHARD:

119 Q. Now, how long prior to the date that I have mentioned, did you handle the car?

A. I could not say without examining my train book.

Q. Had you seen it within a month prior to that time?

A. Yes sir.

Q. Had you seen it within less than a month?

A. I could not say.

Q. Did you see the car immediately after the first day of December, 1906?

A. Yes sir.

Q. State whether or not it was in the same condition as to the brakestaff that it was when you saw it the last time?

A. Yes sir, the same condition.

Q. Do you remember whether you have handled that car when you were braking on this road?

A. I guess I have; it was one of the cars that was in service right along.

Q. Now, state to the jury as you remember, what the condition of this brakestaff was, its length and the condition that the top of the brakestaff was in?

A. Well, I examined it on the 3rd day of December, in 1906, and the brakestaff was fifteen inches high, as near as I could judge, and there was, from the brakestaff to the end of the rack car, there was not over 15 inches at the outside, 15 to 18 inches; there is no nut or anything on the top to hold the wheel on.

Q. Now, how was it as to its appearance compared with its appearance the last time you had seen it?

A. It was the same car 618, the same condition.

Q. I am speaking of the brakestaff?

A. It was the same.

Q. The same?

A. Yes sir.

Q. You were not on this train No. 2, the first of December, 1906?

A. No sir.

Q. Now, Mr. DeMier, how long had you been working for the company prior to the day of this alleged injury, the first day of December, 1906?

A. Nearly two years, I guess.

Q. You say you worked in the capacity of conductor and
120 also brakeman of the train; will you state to the jury whether or not you at any time reported or called the attention of the company to the defective condition of these cars, including this car 618?

Defendant objects unless limited to 618.

Objection overruled.

Defendant excepts.

A. We were always reporting cars in bad order when we found defects.

Q. What do you mean, Mr. DeMier, when you say you were always reporting the cars in bad order?

A. Well, if cars with bad drawbars, or no air, or bad hand holds on cars——

Q. Anything else?

Defendant objects to the answer of the witness and moves to strike it out and take it from the jury because the same is irrelevant, incompetent and immaterial, and is attempting to give reports of other cars aside from 618, and of conditions not involved in this controversy at all.

Objection overruled.

Defendant excepts.

Q. Any other defects reported as to these cars including 618, that you remember?

Defendant objects to the question for the same reason as last stated.

Objection overruled.

Defendant excepts.

A. The hand holds that I have mentioned.

Q. Will you state whether or not that brakestaff had a thread and screw upon the top of it?

A. No sir.

Q. Now, state whether or not that brakestaff was defective, from the knowledge you had of it, when you saw it last before this alleged accident on the first day of December, 1906, and when you saw it on or about the 3rd day of December, 1906?

A. Yes sir.

Q. What do you mean by yes sir?

A. Why, it was defective.

Q. Why was it defective, Mr. DeMier?

A. There was nothing on the brakestaff to hold the wheel on.

Q. What should have been on the brakestaff to hold the
121 wheel, if anything?

A. There should have been either a nut, or it should have been welded on the brakewheel.

Cross-examination.

(Questions by Judge LAUGHLIN:)

Q. Are you working for the defendant company, Santa Fe Central Railway company?

A. Yes sir.

Q. How long have you been working for it?

A. Since I came to work on the 2nd of September of this year.

Q. When did you first commence working for it?

A. I do not remember the exact time.

Q. Well, about when?

A. I think it was in 1905, something like that.
Q. And when did you quit?
A. March 8, 1907.
Q. In what capacity have you worked for the defendant company on this railroad?
A. Brakeman and conductor.
Q. Then you were not working for the defendant any from March, 1907, until September, 1908?
A. No sir.
Q. What salary do you get?
A. Just according to the work I do, and extra man is all.
Q. Well, how much a month.
A. An average of $100.00.
Q. Now, you say you had been working on this car 618?
A. Well, I handled it in the train as it was when that was in service the same as others.
Q. Were you a brakeman from the time you first entered the employment of the company until March, 1907, and conductor also?
A. Well, I was extra conductor most of the time.
Q. Do you know E. E. Friday?
A. Yes sir.
Q. Was he the conductor that you worked under when you were brakeman?
122 A. No sir.
Q. Who did you work under when you were working as brakeman?
A. I worked under Mr. Carlisle and Mr. Robb.
Q. Now, since you came back to work for the company in September last, what position have you been filling?
A. I have been braking and running extra.
Q. Running extra as conductor or brakeman, or both?
A. Conductor.
Q. About what portion of the time did you act as conductor when you first worked for the company?
A. I could not say, it was just extra work, Mr. Friday was an extra conductor himself, and so was I.
Q. And during all that time you saw the condition of this brakestaff and brakewheel on car 618, did you?
A. Well, I saw the condition of all of them.
Q. You saw this one then as well as the others?
A. Along with the others.
Q. Did you ever report the condition of this brakestaff and brakewheel to any of the officers of the company?
A. I could not say that I reported that particular one, but I reported other cars.
Q. Did you report in writing or verbally?
A. Verbally.
Q. Were repairs made to defective machinery when you reported them?
A. Yes sir, in certain cases.

Q. But you do not remember that you ever reported the brakestaff and brakewheel on car 618?

A. No sir.

Q. Never made any report on that one when you were running as conductor or as brakeman?

A. I could not say that I did.

Q. You knew the condition of it all the time?

A. Yes sir.

Q. You said you quit working for the company about March 8, 1907?

A. Yes sir.

Q. And you returned to work for the company again September, 1908?

A. Yes sir.

123 Q. And have been working for it ever since?

A. Yes sir.

Q. Now, you stated that you examined Car 618 and the brakestaff and brakewheel about December 3, 1906; at whose instance did you examine it?

A. Well, I was down with Mr. Lyng, Mr. Grimshaw and Mr. Friday, we were all down there at the depot?

Q. That was here at Santa Fe Depot?

A. Yes sir.

Q. Did either of them ask you to examine it?

A. No, I looked at the car.

Q. Did you call on any of the officials of the company to have that remedied on the 3rd of December, 1906, or at any time since then?

A. Well, I did not have any occasion to, I took the car to Estancia a day or two after that and left it there.

Q. And did not report it yourself?

A. No, I had no occasion to report it.

Q. Were you running as conductor or brakeman at that time?

A. As conductor.

Q. Did they have any rules or regulations with reference to reporting the condition of machinery on that railroad?

A. No sir, they had a car inspector for that business; we could report to him just to help him out, would be all.

Q. Didn't you have a copy of rules and regulations prescribed and adopted by the company for your guidance as conductor, as well as brakeman when you worked on the road?

A. Yes sir.

Q. Didn't those rules and regulations require conductors and brakeman to report defects about machinery?

A. Well, we reported any defects that we saw.

Q. But didn't those rules and regulations require you and all other conductors and all brakemen to report all defects?

Plaintiff objects because it is immaterial. The rules of the company are the best proof of what they are.

Objection overruled.

Plaintiff excepts.

124 Q. Mr. De Mier, did you ever work on any other railroad, or for any other railroad company than the Santa Fe Central Railway Company?

A. Yes sir.

Q. What other railroad company did you work for?

A. I worked in Old Mexico, and worked for the A. T. & S. F.

Q. Do you know of any rule or regulation prescribing the height of brakestaffs on the Santa Fe Central railroad?

Plaintiff objects.
Objection overruled.
Plaintiff excepts.

A. No sir.

Q. Do you know of any rule or regulation on any railroad prescribing the height or length of brakestaffs?

Plaintiff objects as it is immaterial.
Objection sustained.
Defendant excepts.

Q. Do you remember that you ever, at any time, in the capacity of brakeman or conductor or otherwise, reported any defects with reference to the brakestaff or brakewheel on car 618?

A. I could not say that I had on 618; I have on several cars on the train.

Redirect examination.

(Questions by Mr. PRICHARD:)

Q. Do you remember whether or not you ever excluded car 618 from your report as a defective car?

A. I could not say.

A. PINO, called as a witness in behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

(Questions by Mr. PRICHARD:)

Q. State your full name, Mr. Pino.

A. Apolonio Pino.

Q. Where do you live, Mr. Pino?

A. Santa Fe.

Q. What is your business or occupation?

125 A. I am an engineer and machinist.

Q. Where are you working now at this time?

A. For the Santa Fe Central Company.

Q. How long have you been working for that company?

A. About four years.

Q. Were you working for the company on the first day of December, 1906?

A. Yes sir.

Q. In what capacity?
A. Fireman.
Q. Do you remember whether you were on train No. 2 coming from Torrance to Santa Fe on that day?
A. Yes sir.
Q. Did anything of an unusual occurrence happen at or near Williams Spur on that day?
A. Yes sir.
Q. Do you know the plaintiff here, Friday?
A. Yes sir.
Q. Was he on that train that day?
A. Yes sir.
Q. Do you know whether he was on that train between Williams Spur and Clark station on that day?
A. He was on top of the mesa there when we stopped to test the train.
Q. On that train?
A. Yes sir.
Q. In what capacity?
A. As brakeman.
Q. Now, when did you see him last just at that time?
A. I saw him on top of the mesa.
Q. Was that before or after the train started down the hill?
A. Before the train started to go down.
Q. How long before?
A. About a minute before.
Q. He had been on the train up to that point?
A. Yes sir.
Q. Was that the last time you saw him before the train started?
A. Yes sir.
Q. Where were you when the train started?
126 A. I was on the truck shovelling coal.
Q. Who was the engineer?
A. Bob Wolverton.
Q. How far is it from this Williams Spur down to Clark station?
A. About four miles, more or less.
Q. Now, after the train started, how far did it run before it stopped?
A. About five and a half miles.
Q. Did it run beyond Clark station this way before it stopped?
A. Yes sir.
Q. What was the occasion of the train stopping?
A. Because at that time the man that was taking care of the sheep, Monroe Ratliff, he came to where the engineer was, and he said——

Defendant objects to any conversation.
Objection sustained.

Q. I am just asking him why the train stopped?
A. At that time I was on the truck when the train stopped; all that I knew was that the brakeman had fallen off.

Q. Now, what did you do after you were informed that the brakeman had fallen off?

A. We backed the train to Clark, we took off four or five cars, I do not remember, we put them on the side track, and we returned with two coaches to look for the brakeman.

Q. How far did you go back?

A. I think about three miles, more or less.

Q. Did you find the brakeman?

A. Yes sir.

Q. Where did you find him?

A. I think it was near to the mile post 32, I am not certain.

Q. What was the brakeman doing when you first saw him after you went back?

A. I did not see him at that time.

Q. Did you get off the engine?

A. No sir.

Q. So you did not see the brakeman, Mr. Friday, when you got back there?

127 A. No sir.

Q. Did you stay on the engine then until it started?

A. Yes sir.

Q. And remained on the engine until you got to Santa Fe?

A. Yes sir.

Q. What did you do when you got to Santa Fe?

A. I got down from the engine, at that time they were coming out with him, I do not remember whether it was the combination car or the caboose.

Q. Do you remember when these cars that were cut out or set out there at Clark station, were brought to Santa Fe?

A. The same night.

Q. They were brought up the same night?

A. Yes sir.

Q. Were they brought up on the train, or as a part of the train on which this brakeman was placed?

A. No sir.

Q. You left those cars down there and brought him up?

A. Yes sir.

Q. Then somebody went after those cars that night and brought them to Santa Fe?

A. Yes sir.

Q. Where were they the next morning?

A. Here in Santa Fe.

Q. Was car 618, do you remember, in Santa Fe the next morning?

A. I could not give you any numbers of the cars.

Q. Well, all the cars you left down at Clark station were here?

A. Yes sir.

No cross examination.

R. H. WOLVERTON, called as a witness in behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

(Questions by Mr. PRICHARD:)

Q. State your full name, Mr. Wolverton.
A. Robert Henry Wolverton.
128 Q. Where do you live, Mr. Wolverton?
A. Santa Fe.
Q. How long have you been living in Santa Fe?
A. About four years and two months.
Q. What is your occupation?
A. Engineer, locomotive engineer.
Q. For whom are you working at this time?
A. For the Santa Fe Central Railway.
Q. How long have you been working for that company?
A. I have been in the road service of that company about four years and two months.
Q. How long as engineer?
A. About three years and three months.
Q. Were you working as locomotive engineer of that company on the first of December, 1906?
A. Yes sir.
Q. Were you on train No. 2 on that date?
A. Yes sir.
Q. Who was the conductor of that train?
A. Ed. Friday.
Q. Who was the brakeman?
A. Harry Friday.
Q. Who was the fireman?
A. Apolonio Pino.
Q. Where is Williams Spur?
A. Williams Spur is at the top of Clark Hill about 34 miles south of Santa Fe.
Q. Do you remember whether the train stopped at the top of that hill on that day coming this way?
A. Yes sir.
Q. For what purpose did it stop?
A. To test the air.
Q. Was the air tested?
A. Yes sir.
Q. You were running the engine?
A. Yes sir.
Q. Did the engine have any air?
A. Yes sir.
Q. What was the condition of the air on the engine?
A. Well, the engine was equipped with brake valve, air gauge and main storage for the air.
129 Q. What was its working condition?
A. I do not exactly understand the question.

Q. Was the air appliances on the engine in good order or not?
A. There was no air brakes on the engine.
Q. There were no air brakes on the engine?
A. No sir.
Q. State how many cars there were on the train.
A. Seven.
Q. Were there any other cars on that train with no air brakes?
A. I was notified that there was two without air.
Q. What two?
A. I could not say.
Q. Now, do you know what the grade is down that hill?
A. The steepest part of the grade is about 3 and 4-10 per cent.
Q. Do you know whether it is necessary to have the brakeman upon that train to assist in checking the speed of the train for that number of cars?
A. Yes sir, I think so.
Q. Why do you think so?
A. Well, I would not consider it safe to handle a train of that kind on the hill without assistance of the brakeman.
Q. State whether or not you knew the condition of these cars, especially the rack cars as to brakestaffs, brakewheels and air brakes?
A. No sir.
Q. How long had you been running as engineer there?
A. About eighteen months.
Q. What were your duties?
A. Well, it was my duty to handle the train safely and take orders from the conductor, and work according to his instructions unless it endangered the train.
Q. Well, did you participate in an occasion like that in examining to see whether the train was safe?
A. No, it was not in my line to examine the cars.
Q. That was left to the conductor?
A. Yes sir.
130 Q. Do you remember whether you ever made any reports to the Master Mechanic as to the defective condition of any of those cars?
A. No sir.
Q. Or to anybody else; did you call anybody's else attention to it?
A. No sir.
Q. Do you remember whether you reported to the Master Mechanic that there were only three cars that had air brakes on that train?
A. No sir.
Q. Do you know whether such a report was made or not?
A. No sir.
Q. Were you leaving the question as to the defective machinery in the cars, in the brakestaffs, etc., to the conductor?
A. Well, as to the cars, yes sir.
Q. Your part of the business was simply to act under his instructions and take care of the locomotive?
A. Yes sir.

Q. Now, after you started down the hill that night, did you make a stop anywhere?
A. Not until we came to Clark.
Q. But you did make a stop there?
A. We stopped near Clark.
Q. Then you did go back?
A. Yes sir.
Q. What did you go back for?
A. We went back to look for Harry Friday.
Q. Is that this boy here? (indicating plaintiff.)
A. Yes sir.

Cross-examination.

(Questions by Judge LAUGHLIN:)

Q. Mr. Wolverton, who was in charge of the train that night?
A. Ed. Friday.
Q. Edward E. Friday?
A. Yes sir.
Q. Brother of the plaintiff in this case?
A. Yes sir.
131 Q. What capacity was he acting in at that time?
A. Conductor.
Q. Who is in charge of the entire train when it is running and when it is being made up; that is, who is the head of it?
A. The conductor.
Q. He is in charge of the entire train as to the making of it up, when they start and when they stop, and has the management of the whole train?
A. Yes sir.
Q. What did you say the grade at the hill is after you leave Williams Spur going north?
A. About 3 and 4-10 at the steepest part.
Q. For what distance is that grade 3 and 4-10?
A. I could not say; the hill is about three miles long, on an average, I should judge of about three per cent.
Q. What speed was the train making that night as it came down the hill from Williams Spur to Clark?

Plaintiff objects as it is not cross examination.
Objection overruled.

By Judge LAUGHLIN: "I will withdraw that question and ask him another question first."

Q. Did you make a report on the speed of the train that day coming down?

Plaintiff objects as it is immaterial.
Objection overruled.
Plaintiff excepts.

A. Yes sir.

Q. I will ask you if as engineer it is your duty always to make report of the speed of the trains that you are running as engineer?
A. No sir.
Q. On what occasions are you required to make reports?
A. In case anything happens.

(Witness handed paper.)

Q. What is this paper I have handed you and that you have examined, Mr. Wolverton?
A. That is a report of the accident.
Q. Did you make that as engineer?
A. Yes sir.
Q. And that is your signature?
132 A. Yes sir.

Defendant offers this paper for identification and asks that it be marked defendant's Exhibit "5".

Q. What kind of weather was it that evening, Mr. Wolverton?
A. It was misting rain.
Q. What time in the evening was it that you left Williams Spur, do you remember?
A. About 5:15.
Q. Do you remember about what time it was when you arrived at Clark Station?
A. About 5:30 or 35.
Q. Do you know about how far it is from Williams Spur to Clark?
A. About five and a half miles.
Q. What kind of brake did your engine have that evening, if any?
A. It had a vacuum brake worked by steam, I believe it is called an Ames vacuum brake.
Q. Was it in working order at that time?
A. Yes sir.
Q. Did you have any other braking appliance on the engine?
A. No sir.
Q. Were any other brake appliances necessary on the engine at that time?
A. Well, those brakes did not control the engine very well.
Q. Were there any brakes on any of the cars that you know anything about?
A. Nothing more than I was instructed that there was two cars without air.
Q. And how many cars did you have on the train?
A. Seven.
Q. Who gave that instruction that there were two cars without air?
A. I do not remember if it was the conductor or brakeman, one of the two.
Q. That was the conductor E. E. Friday, or the brakeman, Harry S. Friday, the plaintiff in this case?

A. Yes sir.

Q. How was the speed of the train that night as compared
133 with the speed of trains ordinarily coming down the hill, I mean trains which you were running as engineer?

A. Well, it was less than the average.

Q. What was the average speed that you usually traveled down that hill?

A. Twenty-two miles; that was our running time on the present time card.

Q. Do you know what the speed was that night?

A. Well, I should judge it was about 12 or 14 miles.

Q. From the top of the hill at Williams Spur to Clark Station?

A. Well, from the top of the hill to the bottom of the steepest grade; it would exceed that from there to Clark.

Q. But going down the steepest part of the hill, how did that compare with the speed from the bottom of the hill to Clark?

A. About one-half as much.

Q. Now, which was the greatest, the speed going down the hill, or after you struck the foot of the hill to Clark?

A. The speed was greater after we struck the foot of the hill.

Q. Did you observe any difference in holding the train from the time you left the top of the hill until you arrived at Clark?

A. Well, I noticed that the air was very poor, that is why I run so slow down the hill.

Q. You had nothing to do with the equipment of the cars, or the management of the air appliances on the cars, had you?

A. No sir.

Redirect examination.

(Questions by Mr. PRICHARD:)

Q. You are still in the employ of the railroad company, are you not?

A. Yes sir.

M. R. RATLIFF, called as a witness in behalf of the plaintiff, after being duly sworn, testified as follows:

134 Direct examination.

(Questions by Mr. PRICHARD:)

Q. State your full name.

A. Monroe Ralph Ratliff.

Q. Where do you live?

A. Roswell.

Q. What business are you in?

A. Well driller.

Q. Have you ever been railroading?

A. Yes sir.

Q. What company have you worked for?

A. Santa Fe Central.

Q. Were you working for that company on the first day of December, 1906?
A. No sir.
Q. You were not working for the company then?
A. No sir.
Q. Had you worked for the company before that?
A. Yes sir.
Q. Do you remember whether you were on train No. 2 coming from Torrance to Santa Fe on that day?
A. Yes sir.
Q. What were you doing on that train?
A. I was coming up with some sheep.
Q. Where were the sheep?
A. On the train, on the cars.
Q. How many cars?
A. Four.
Q. You were looking after the sheep?
A. Yes sir.
Q. Do you remember when you started down the hill from Williams Spur?
A. Yes sir.
Q. Where were you when you started down?
A. I was standing on the front end of the caboose.
Q. Do you remember seeing this young man, Mr. Friday, there?
A. Yes sir.
Q. Do you know about where he was when you started down?
A. Yes sir.
Q. Where was he?
135 A. He was on the third car from the caboose towards the engine.
Q. Do you know the number of the car?
A. Yes sir.
Q. What was the number?
A. 618.
Q. Which end of the car was he on, the north or the south end?
A. He was on the north end.
Q. Do you know whether that was the end that the brakestaff was on and brakewheel?
A. Yes sir.
Q. Where was he standing with reference to the brakestaff and brakewheel when you started down the hill?
A. He was standing on the left side.
Q. Do you remember how long you saw him in that position?
A. No sir, I could not say just how far, but around the curve then he went out of sight of me.
Q. Was he there the last time you saw him at that time?
A. Yes sir.
Q. Now, what did you do, if anything, after the train started down the hill?
A. After we got about pretty near to the dike down there——
Q. How far is it from the top of the hill?

A. Somewhere about five miles I guess—I started over the train. Mr. Friday asked me to see if Harry Friday was in the engine, and I went out to where this wheel was, out where Harry was at, and the wheel was hanging over the brakestaff, and I went on over to the engine and asked Mr. Wolverton if Harry was there and he said "no". At that time we were at Clark and we stopped and he set out the sheep and went back to pick up Harry.

Q. Now, when you started to go through the cars, where did you start from?

A. From the caboose.

Q. What was the first car that you went through?

A. Sheep car.

Q. How did you go through that?

A. I had to walk through the car with the sheep.

136 Q. Well, you walked through the sheep, and the next car?

A. I had to go through that one the same way, the first four cars I went through the sheep.

Q. Then you walked through the sheep, as I understand, of these four rack cars?

A. Yes sir.

Q. There was no running board on those cars that you could walk on?

Defendant objects as it is immaterial.

Objection sustained.

Q. Now, did you pass over this car 618?

A. Yes sir, I passed through it.

Q. When was it you noticed that the brakewheel was hanging over the brakestaff of car 618?

A. When I first got to it, we passed the dike.

Q. State to the jury how that brakewheel was hanging over the brakestaff when you got there.

A. Well, the brakewheel was setting on the center of the staff when it is up, and then there is something like a spoke in it, and another wheel outside of it, and it was hanging over on the outside part of the wheel.

Q. Where was the wheel resting?

A. Resting down where the brakestaff came up from the car.

Q. In other words, it had dropped down over the brakestaff and was lying on the platform of the car?

A. Yes sir.

Q. Did you disturb the wheel?

A. No sir.

Q. Who did you speak to about this matter after you saw the wheel?

A. Bob Wolverton, the engineer.

Q. Now, as you went through the cars, did you see this young man, Harry Friday?

A. No sir.

Q. Did not see him?

A. No sir.
Q. What did the engineer do after you spoke to him?
A. He said Harry Friday was not on the engine.
Q. What did he do?
A. He stopped.
Q. Then what did he do?
137 A. Backed up and set out the sheep cars.
Q. Where did he set them out?
A. At Clark.
Q. Now, after he set them out what did he do?
A. We hooked on to the caboose and coach and backed up where Harry Friday was.
Q. How far back did you go?
A. We went about three-quarters of a mile above the dike.
Q. And who did you see then?
A. Harry Friday.
Q. Now, who were among those people that went back?
A. Bob Wolverton and Pino, the fireman, Mr. Friday and myself, and some passengers, but I do not know who they were.
Q. Now, did you see the brakeman?
A. He was not on the train then, we seen him after we got to the hill.
Q. The conductor of the train was Ed. Friday, and Harry Friday was the brakeman?
A. Yes sir.
Q. Where did you next see Harry Friday, the brakeman?
A. I suppose about a quarter of a mile above the dike, or three-quarters.
Q. What was he doing when you first saw him?
A. Walking down the track.
Q. Which side of the track was he on, the west or the east.
A. He turned out on the west side.
Q. Now, did you approach him?
A. Yes sir.
Q. Did you notice his condition when you came up to him?
A. Yes sir.
Q. What did you notice?
A. I noticed that he was awful bloody, blood running down his face and said he guessed he had lost his arm.

Defendant objects.
Objection sustained.
Plaintiff excepts.

138 Q. Now, you saw him in that condition, who was with him when you saw him there?
A. Ed. Friday.
Q. Anyone else?
A. I do not know of anyone else, I was on the back end of the train.
Q. What was done with the brakeman?
A. Put him in the caboose.

Q. And he was brought to Santa Fe?
A. Yes sir.
Q. Now, Mr. Ratliff, were you more or less familiar with this car 618 before this accident occurred?
A. I do not know that I was any more with it than I was with the others, I was passing through all of them.
Q. Can you state what sort of brakestaff car 618 had on that night when you came down the hill?
A. I could not state exactly what kind of a brakestaff it was, but it seemed to be the same as the others only shorter.
Q. Did you observe that brakestaff after the accident?
A. Yes sir.
Q. When was that?
A. At Santa Fe here.
Q. Was that the same night or the next day?
A. The same night.
Q. Were those cars brought up the same night?
A. Yes sir.
Q. Did you make an examination of the brakestaff and brake-wheel that night?
A. Yes, sir.
Q. State to the jury what you found.
A. I found that the brakestaff was a pretty short brakestaff, and the wheel you could tighten it up with a brakestick and it would jump off if you did not push down.
Q. Where was the wheel when you examined it that night?
A. It was on the brakestaff.
Q. On top of the staff?
A. Yes sir.
Q. Now, what was there on the staff, if anything, to hold the wheel in place?
A. Nothing at all.
139 Q. How did the top of that brakestaff look with reference to the top of this piece of iron that I am holding in my hand?
A. Just like that, it was fixed just like the top of that.
Q. How did it look with reference to the shape of the top compared with the shape of this iron that I have in my hand? (holding brakestaff in hand.)
A. Just like that.
Q. How did it look with reference to its height from the platform of the car compared with the height of this iron, from the wheel upon which I have placed my hand?
A. Some like that, about the height of that.
Q. You say you had been engaged in railroading prior to that time?
A. Yes sir.
Q. Did you notice the speed of the train as you came down the hill that night?
A. Yes sir.
Q. Do you know anything about the grade of that hill?

A. Well, I think somewhere about three and a half or four per cent.
Q. At what speed were you going down the hill that night?
A. Somewhere about 20 miles.
Q. You mean 20 miles what?
A. Twenty miles an hour.

APOLONIO PINO, recalled to the witness stand.

Recross-examination.

(By Judge LAUGHLIN:)

Q. Mr. Pino, did you make any report on the accident which occurred to the plaintiff, December 1, 1906?
A. Yes sir.
Q. In what capacity did you make that report?
A. It was as the fireman.
Q. I will ask you if this is the report you made? (Witness handed paper.)
A. Yes sir.
Q. Is that your signature, A. Pino?
A. Yes sir.

140 Defendant offers this paper for identification and asks that it be marked defendant's Exhibit "6".

The court here adjourned until two o'clock P. M.

Pursuant to adjournment, the court met at two o'clock P. M. Same parties present.

M. R. RATLIFF still on witness stand.

Cross-examination.

(Questions by Judge LAUGHLIN:)

Q. How old are you, Mr. Ratliff?
A. Twenty-one years.
Q. How long have you been employed by railroad companies?
A. Somewhere about four months or five.
Q. For what company are you working?
A. Santa Fe Central.
Q. Working for it at this time, are you?
A. No sir.
Q. Where do you reside now?
A. Live in Roswell.
Q. What business are you engaged in?
A. Well drilling.
Q. When did you work for the Santa Fe Central Railway Company?
A. In 1903 and 1904, first and last.
Q. Work about five months you say for railroads?
A. Yes sir.

Q. Ever worked for any other company?
A. No sir.
Q. What kind of weather was it that evening at the time the plaintiff got hurt?
A. Why, it had been misting rain that day, that evening.
Q. Where did the rain begin to fall on you?
A. About Moriarty I think, somewhere about there.
Q. And how long did it rain that evening?
A. Why, it did not rain very heavy, it misted up to the top of the hill, I think.
Q. Rain on you any after you left Williams Spur?
A. It did not rain any on me I think, I was in the caboose;
141 it did not rain when I went across the cars.
Q. What position did you occupy when you worked for the Santa Fe Central at that time?
A. I was not working for them then.
Q. You were not working for them at that time?
A. No sir.
Q. What were you doing on the train at that time?
A. I was going up to Santa Fe with some sheep.
Q. You were shipping the sheep, were you?
A. No sir, I was taking care of the sheep for another fellow.
Q. Whose sheep were they?
A. Bob Owens.
Q. When did you quit working for the railroad company?
A. Some time in 1904, I do not know just when.
Q. Now, where were you when you first missed the plaintiff from the train?
A. Well, when I got to where the brakestaff had fallen, I had missed him, I could not just say where it was I missed him, it was near the dike.
Q. The conductor sent you back to look for the brakeman, did he?
A. He told me to go across and see if I could see him on the engine
Q. About how far were you from Clark at that time?
A. We had not got to that dike yet when I started over the train.
Q. Well, about how far is that dike south from Clark station?
A. Somewhere about three miles, I think.
Q. Then you ran on into Clark and cut out the sheep cars and went back?
A. Yes sir.
Q. Where was the conductor Friday standing when he told you to go back and look for the brakeman?
A. He was standing on the front end of the caboose.
Q. Where was the plaintiff, Harry Friday when you saw him last at Williams Spur?
A. He was on the car.
Q. Which car?
A. 618.

Q. On which side of the car and which end?
142 A. He was on the north end.
Q. And on which side?
A. The west side, the left hand side.
Q. What was he doing at that time?
A. Why, he was standing up when I seen him.
Q. Was not doing anything only standing on the car?
A. No sir, the train had not started, it had stopped there.
Q. Now, you say you found the brakewheel slipped down over the brakestaff when you were near the dike and about three miles south from Clark?
A. Yes sir, I said it was somewhere about the dike, we had not passed the dike, we were passing it.
Q. Did you make an examination of the brakestaff there at that time?
A. No sir, I just held a lantern up like that and saw where it was hanging, I did not stop.
Q. Did you examine the brakewheel and brakestaff after that, that is, on car 618?
A. Yes sir.
Q. When?
A. That night after we got in here.
Q. What time of night was that?
A. Somewhere I suppose about one o'clock.
Q. Who was with you at that time?
A. Thompson.
Q. Was he in the employ of the road?
A. He was acting as conductor that night when we went back to get the sheep.
Q. The engine brought in the caboose and the passenger coach with Mr. Friday, and then went back after the sheep?
A. Yes sir.

FRED T. FISHER, called as a witness in behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

(Questions by Mr. PRICHARD:)

Q. State your name.
A. Fred T. Fisher.
Q. Where do you live, Mr. Fisher?
A. I live 22 miles from Estancia at the Perdenals.
143 Q. How long have you been living in this Territory?
A. Ten years.
Q. State whether or not you were employed by the Santa Fe Central Railway company prior to the first day of December, 1906?
A. Yes sir.
Q. For how long?
A. Two years and a half.
Q. In what capacity?

A. As brakeman and conductor.
Q. Where was your run?
A. From Santa Fe to Torrance.
Q. Were you familiar with the rolling stock of that road during that time?
A. Yes sir.
Q. Did you have any knowledge of a number of cars known as the rack cars during the time you were connected with the road?
A. Yes sir.
Q. Do you know whether or not the brakestaffs of any of those cars had been cut off?

Defendant objects unless it is shown that it applies to car 618, and that it was some time within a few months prior to the time the accident occurred.
Objection overruled.
Defendant excepts.

A. Yes sir.
Q. How long did that condition of things exist while you were in the employ of the company?
A. All the time I was employed.
Q. You say that you were employed about two and a half years?
A. Yes sir.
Q. Now, do you know the condition of these brakestaffs during that time as to the length and as to the point on top of the brakestaffs, and as to how the brakewheel rested upon the brakestaffs?
A. Yes sir.
Q. Now state to the jury how they were cut off and their general appearance.

Defendant objects as it has not been shown that this witness was in the employ of the company at any time immediately pre-
144 ceding the accident, and it has not been shown when he was employed.
Objection overruled.
Defendant excepts.

A. To the best of my knowledge at the time I was employed by the Santa Fe Central, the brakestaffs on some of the rack cars were cut and had been squared at the point so the brakewheel could rest upon it.
Q. Now, state whether there were any threads or nuts at the ends of the brakestaffs above where the wheels rested.
A. There was no nut or thread on some of the cars.
Q. Can you state about how many cars, more or less, were in the condition that you describe as to the brakestaffs, more or less?
A. No, I cannot.
Q. Well, were there more than two of such cars?
A. To the best of my knowledge there was.

Defendant objects.
Objection overruled.
Defendant excepts.

Q. Was there more than three?

A. I could not say how many there was. I may have noticed the same car several times.

Q. Can you state whether or not there were several of them?

A. Yes, I believe there were several.

Q. Now, you look at this iron I hold in my hand, and especially the top of the iron, and state what the condition of these brakestaffs you refer to was, as compared with the condition of this iron at the top? (Witness shown brakestaff.)

A. They were similar to that.

Q. Similar to that?

A. Yes sir.

Q. Now, how similar were they?

A. They were squared and tapered to about the same point.

Q. What was their condition as to being similar in height from the platform of the cars?

A. I believe about the same length.

Q. Now, you state to the jury, will you, whether or not you worked as a brakeman on any of these cars you have mentioned?

A. I have.

Q. Up to within what time did you work as a brakeman on these cars before this first day of December, 1906?

A. August, 1906.

Q. You worked up to August prior to the first of December, 1906?

A. Yes sir.

Q. Where did you have your experience as a brakeman on that line?

A. I had my experience on the Santa Fe Central.

Q. On what part of the road of the Santa Fe Central?

A. Why, at various stations between here and Torrance.

Q. Then practically all along the line between Santa Fe and Torrance?

A. Yes sir.

Q. What is the distance on that line between those points?

A. 116 miles.

Q. Did you ever have any occasion, while you were a brakeman and in the employ of the company, to handle any of the brakes of the description that you have given?

A. Yes sir.

Q. Now, state whether or not you ever handled the brakewheels and brakestaffs that had no threads or nuts upon the ends of the staffs.

A. I have handled them.

Q. State whether anything ever occurred of an unusual character to you in the handling of these brakestaffs and brakewheels.

Defendant objects because the question does not relate to any of the issues in this case, and further for the reason that the same is irrelevant, incompetent and immaterial.

Objection overruled.

Defendant excepts.

A. On several occasions the brakewheels came off.

Q. Under what circumstances would these wheels come off these brakestaffs?

A. They would come right off in my hands, right off the staff.

146 Q. What were you doing with the wheels when they would come off that way?

A. I would be applying the brake.

Q. Was that when the train was in motion?

A. Yes sir. I believe it occurred to me when the train was in motion and in setting out cars at different side tracks.

Q. Do you remember any particular places where these things occurred to you?

A. No, I do not.

Q. State whether or not the slipping of these wheels off of the brakes in the manner you have described, occurred more than once.

A. Yes sir.

Q. What was the cause of the wheels slipping off of the brakes in the manner you have described?

A. Why, the pressure of the wheels of the brake I believe, caused the wheel of the staff to come off.

Q. Now, was there anything on the end of the staff to protect the wheel and prevent it coming off when these things happened?

A. No sir.

Cross-examination.

(Questions by Judge LAUGHLIN:)

Q. How long did you say you worked for the Santa Fe Central Railway company?

A. About two years and a half, in the train service.

Q. As conductor and brakeman?

A. Yes sir.

Q. Do you know anything about when any of these brakestaffs were cut off?

A. Yes sir.

Q. When was that?

A. They were cut off in the construction of the road, I believe; I was employed by the Pennsylvania Development company at the time.

Q. What year was that?

147 A. I could not say, sir.

Q. Do you remember anything about whether the brakestaff on car 618 was cut off or not?

A. I could not say, sir.

Q. Do you know whether that was one of the cars used by the Pennsylvania Development Company in constructing the road?

A. I could not be sure of that, that it had been used.

Q. You do not recollect anything about the cars by their numbers then, do you?

A. No sir.

Q. Do you recollect anything about whether the same cars were in use by the company the first day of December, 1906?

A. No sir.

Q. You do not know when they quit using those cars then, if they ever quit at all?

A. No sir.

Q. And you say these brakestaffs were cut off when the road was being constructed?

A. Yes sir, there were some brakestaffs cut off at that time.

Q. And they were in use up to the time you quit the road?

A. Yes sir.

Q. Do you know anything whether there is any rule prescribed as to the length of brakestaffs, or how they should be constructed, or anything of that kind?

A. No sir, I do not believe there is any rule.

Q. Do you know when these rack cars were first constructed so as to haul sheep?

A. I could not say exactly the time.

Q. About what year?

A. I think about 1904, it may have been earlier than that.

148 Q. Where does this Santa Fe Central road begin and where does it end?

A. To the best of my knowledge, it begins at Santa Fe and ends at Torrance.

Q. Is that entirely within the Territory of New Mexico?

A. Yes sir.

Q. Did any of the trains that you worked on as brakeman transfer sheep and livestock from Estancia and Torrance and different places down there to Santa Fe over the same road?

A. Yes sir.

Q. In these rack cars?

A. Yes sir.

W. J. MAY, called as a witness in behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

(Questions by Mr. PRICHARD:)

Q. Mr. May, state your full name.

A. William J. May.

Q. Where do you live at this time?

A. Las Vegas.

Q. Were you at one time employed by the Santa Fe Central Railway Company?

A. Yes sir.

Q. What period of time did that employment cover?

A. Well, I do not know just the exact time, but I went to work for them in August and I think I was discharged in November.

Q. Of the same year?

A. Of the same year.
Q. Do you remember what year?
A. 1906.
Q. State whether or not you were in the employ of that company as car inspector?
A. I was car inspector at that time.
149 Q. Now, as a car inspector did you have occasion to inspect any of the cars known as the rack cars upon that road?
A. Yes sir.
Q. What did you inspect them with reference to?
Q. Why, it is the duty of the inspector to inspect the cars to see that they are all O. K. that is, fit to be in operation.
Q. Now, if they are not found fit to be in operation, then what is the duty of the inspector?
A. Well, if a car is not all right and supposed to be in bad order shows it is not safe to be on the road.
Q. Now, what does the inspector do, if anything, to indicate that the cars are in bad order, with reference to the cars themselves?
A. He is to bad order the cars; that is, when I was working there they had no bad order cards and I used chalk to put the bar order on.
Q. Now, do you remember whether you examined these rack cars or any of them, for the purpose of determining whether they were in bar order or not?
A. Yes sir, I did.
Q. What was the result of the examination, if anything, so far as you were concerned?
A. In inspecting the cars, I found quite a number of them in bad order.
Q. What did you do to them?
A. I bad ordered them.
Q. Do you remember whether there was a car among those cars numbered 618?
A. Yes, rack car 618 was bad ordered.
Q. By whom?
A. By me.
Q. Were you the car inspector of the road at that time?
A. Well, I was car inspector at the time I bad ordered those cars.
150 Q. Now, did you indicate that, what did you do to show that it was in bad order?
A. I marked B. O. on both sides of it.
Q. What did you mark it with?
A. With chalk.
Q. Where did you mark it, Mr. May?
A. On the side sill.
Q. Are those the sills against the platform, or what?
A. The side sill is the outside sill, that is, the sill is built up—that is, a side sill, a center sill and end sill.
Q. Then these marks were put on the side sills?
A. Yes sir.
Q. That is, those letters you refer to "B. O."?

A. Yes sir.
Q. What size letters were they?
A. They were good large sized letters.
Q. Could they have been seen distinctly, plainly?
A. Well, they could at the time I put them on, but whether they remained there I do not know, for the cars were in bad order some time before.
Q. Do you know whether they were kept in the service of the road after you bad ordered them, with reference to the time you left the road?
A. I do not know just exactly how long they were kept in service.
Q. Were they kept in service at all after you bad ordered them?
A. Yes sir.
Q. When did you bad order them, Mr. May, about what month was that?
A. I am pretty positive that I bad ordered them about the 20th of November.
Q. 1906?
A. Yes, 1906.
151 Q. Do you know whether they had been inspected at the time you bad ordered them?

Defendant objects because the same is irrelevant, incompetent and immaterial.
Objection sustained.
Plaintiff excepts.

Q. When did you leave the employ of the company, Mr. May?
—. As near as I remember, I was discharged the 28th of November, 1906.

Cross-examination.

(Questions by Judge LAUGHLIN:)

Q. When did you commence work for the company?
A. The month of August, 1906.
Q. What position did you take when you entered the service of the company?
A. Car inspector.
Q. Were you car inspector all the time from August, 1906, until you quit the service of the company in November, 1906?
A. No sir, I was not kept in that position altogether.
Q. Well, about how much of that time did you act as car inspector?
A. I do not know the exact days, but I was switched; sometimes I was doing telephone line work, other times I was working in other departments.
Q. So you had different positions?
A. Only to fill out in case there was a man short.
Q. Was there a regular car inspector of the defendant company at that time?
A. I was supposed to be the regular car inspector.

Q. Under whose orders were you working?
A. Mr. Frank Zink.
Q. What position did he occupy?
A. He was Master Mechanic.
152 Q. What business are you engaged in at the present time?
A. I am working for a wholesale fruit company in Las Vegas.
Q. How long have you worked at railroad business?
A. Well, up to the time I went to the Central, I had been working in the railroad business about two years, that is, working for the electric street railway in Las Vegas and A. T. & S. F. in Las Vegas.
Q. What position did you hold when you were working for the electric street car railroad?
A. I was motorman and what they call a trouble man, that is, a repair man, they call it trouble man.
Q. What position did you occupy when you were working for the A. T. & S. F.?
A. I was inspector, hostler and afterwards car repairer.
Q. You do not remember any of the particular cars that you inspected and bad ordered on the Santa Fe Central, do you ?
A. Yes sir.
Q. Can you name them?
A. Well, there was coal car 1024, and rack car 1009, box car 100, rack car 621 and rack car 618.
Q. When did you inspect car 618 and bad order it?
A. About November 20, as near as I can remember, 1906.
Q. About November 20?
A. Yes sir.

A. R. JONES, called as a witness in behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

(Questions by Mr. PRICHARD:)

Q. Mr. Jones, state your full name.
A. Albert R. Jones.
153 Q. Where do you live?
A. In Estancia.
Q. How long have you lived there?
A. Three years.
Q. What are you engaged in at this time?
A. Carpenter by trade.
Q. Have you ever been in the employ of the Santa Fe Central Railway Company?
A. Yes sir.
Q. When were you in the employ of that company?
A. Off and on since the 16th day of July, 1906.
Q. In what capacity were you employed?
A. Bridge service about eight months; then I was brakeman.
Q. How long were you braking?

A. I worked on there about nine months.
Q. Were you familiar with the rolling stock of the company during that time?
A. Yes sir.
Q. Were you familiar with the cars known as the rack cars?
A. Yes sir.
Q. Did you ever brake on them?
A. Yes sir.
Q. State what the length of the brakestaffs were on those cars?

Defendant objects unless the question is confined to car 618.
Objection overruled.
Defendant excepts.

A. Some of them were from eleven inches up to 24.
Q. Did you work on any of those cars?
A. Yes sir.
Q. Did you ever have any accidents on those cars?
A. One or two, yes sir.

154 Defendant objects and moves to strike out that answer, because the same is irrelevant, incompetent and immaterial.
Objection overruled.
Defendant excepts.

Q. State the character of the accidents?
A. I was setting the brake coming down the hill when the chain broke and I fell across the draw bars on the opposite car.
Q. Now, you speak about coming down the hill, what hill was that?
A. Clark Hill.
Q. What station had you just left when you started down the hill?
A. Williams Spur.
Q. You say you fell across the bars, what do you mean by that?

Defendant objects because the same is incompetent, irrelevant and immaterial.
Objection overruled.
Defendants excepts.

A. Well, that is the couplers between the cars.
Q. State whether or not the train was in motion when you fell in that position?
A. Yes sir, it was in motion.
Q. Do you remember which one of the rack cars it was that you were on when that accident happened?
A. No sir, I cannot say which one.
Q. Do you remember whether it was a short or a long brake?
A. It was a long brake, that is, it was longer than some of them, it was not a full height brakestaff.
Q. Do you remember any other accident that occurred to you with regard to the brakestaffs or the brakewheels on any of those cars?
A. No.

155 Cross-examination.

(Questions by Judge LAUGHLIN:)

Q. Mr. Jones, you said that brakestaff on the car which you were operating when the chain broke was not the full height?
A. Yes sir, that is what I said.
Q. What is the full height of a brakestaff?
A. About 24 inches.
Q. Do you know of any rule or regulation fixing the height of brakestaffs?
A. There is none that I know of.
Q. And why do you say that was not full height?
A. Because I have had enough experience to know a little something about them.
Q. How long have you been in railroad business operating trains?
A. About seven years.
Q. Where?
A. On the Texas and Pacific.
Q. What is your age now?
A. About thirty years old.
Q. What position did you occupy when you were working for the Texas and Pacific?
A. Fireman.
Q. How long have you acted as brakeman on railroads?
A. About twelve months.
Q. On what line?
A. On the Santa Fe Central and A. T. & S. F.
Q. Was the reason that the brakestaff was short that caused the chain to break that you refer to?
A. No sir, it was not.
Q. What was that chain used for?
A. It was used to wind up the brake, it is fixed on the brakestaff there, you can see.
Q. A chain just like that that broke?
156 A. Yes sir.
Q. Did you ever hear of a chain breaking before?
A. Yes sir.
Q. You have known of chains breaking frequently, have you not?
A. No sir, not many of them, I have known two or three of them to break.
Q. Now in your experience as brakemen for twelve months, that is a good many, is it not?
A. I do not know that it would be a good many, no sir.
Q. What made that break, do you know?
A. There was too much weight on it, I guess.
Q. It was a chain just like that? (Indicating chain on brakestaff)
A. Yes sir.
Q. Is that about the ordinary size?
A. Yes sir, that is about the ordinary size.
Q. It is about the same size used on most railroads, is it not?

A. Yes, there are different chains; sometimes twisted chains are used, some are straight lengths.

Q. No two railroads use the same size or kind of chains?

A. I do not know about that, I suppose they do.

Q. You suppose they do, but you don't know anything about it, do you?

A. I do not know, I guess they do.

Q. You are just guessing at it then?

A. Well, I do not know what chains they use, as far as that is concerned I never asked them.

Q. The fact is you do not know much about that?

A. I do not know much about that, I know some are pretty poor chains.

Q. Did you ever know of more than one chain breaking on this line?

157 A. Yes sir, I have seen one of them that was not fastened at all.

Q. Did you fasten it?

A. It was not my duty.

Q. You did not care whether they were fastened or not?

A. It was not my duty.

Q. You did not tell any one else about it either?

A. Yes sir, I have told Mr. Zink several times about it.

Q. How long since Mr. Zink left the employ of the company?

A. About 18 or 20 months, I guess, in December, 1906.

Q. Who is the Master Mechanic now?

A. Mr. Peden.

Q. Did you ever tell him about any of these chains you saw loose?

A. No sir, I have never worked under him.

Q. You are not working for the Santa Fe Central now?

A. No sir.

Q. When did you quit working for it?

A. The 16th day of October 1907.

Q. What business are you engaged in now?

A. Carpenter.

Q. Railroad carpenter or house carpenter?

A. House carpenter.

Q. Where is your residence?

A. I have not got any.

Q. You work where you get work and sleep wherever you get a place to sleep?

A. I always have a place to sleep.

Q. It didn't make much difference to you whether the machinery was fixed about the trains or not, when you were working on them, did it?

A. No.

158 Q. And you didn't care either, did you?

A. Yes sir. I would rather work with good stuff than bad stuff.

Q. You were simply working for your salary?

A. Yes, I was working for the railroad company.
Q. Did you draw a salary?
A. I certainly did or I would not work.
Q. Then you were working for your salary?
A. Yes, I was working for my salary.
Q. And you saw a great many things that were wrong about the railroad company and did not quit, just kept on?
A. Yes, I quit.
Q. But you saw them a great while before you quit?
A. Yes sir.

S. B. GRIMSHAW, called as a witness in behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

(Questions by Mr. PRICHARD:)

Q. Will you state your name, Mr. Grimshaw?
A. Samuel B. Grimshaw.
Q. Where are you residing, Mr. Grimshaw?
A. Santa Fe, New Mexico.
Q. What is your occupation at this time?
A. Chief clerk at the New Mexico Penitentiary.
Q. Were you ever in the employ of the Santa Fe Central Railway Company?
A. Yes sir.
Q. Covering what period?
A. January 1, 1904, to July 6, 1908, inclusive.
Q. In what capacity?
A. Chief clerk to the General Manager from January 1,
159 1904, to September 1, 1904, and then Assistant to the President and General Manager from that time to July 6, 1908.
Q. In what capacity were you connected with the road on the first of December, 1906?
A. Assistant to the president and general manager.
Q. Where were your offices at that time?
A. On the corner of the Plaza where they are at present in the city of Santa Fe.
Q. Who was the Master Mechanic of the road at that time, Mr. Grimshaw?
A. I think it was Mr. Frank Zink.
Q. Do you remember, Mr. Grimshaw, of the occasion when Mr. Harry S. Friday received certain alleged injuries while working as brakeman on the road of this company?
A. Yes sir.
Q. When was the first time, and where did you see the brakeman, if at all, after his alleged injury?
A. The same evening he was injured, in the caboose at the Santa Fe Central depot in Santa Fe.
Q. Do you know what was done with him?
A. Yes sir, I assisted in removing him to the bus and in taking him up to the Sanitarium in the city.

Q. Where was Mr. Zink stationed at the time as Master Mechanic of the road?
A. At Estancia, New Mexico.
Q. Do you remember whether you had occasion after this alleged injury to telegraph to Mr. Zink with relation to train No. 2, from Estancia to Santa Fe on the first day of December, 1906?.
A. Yes sir.
Q. Did you send him a telegram?
A. Yes sir.
Q. Look at this, Mr. Grimshaw, and state whether you ever saw that before. (Witness handed paper.)
A. Yes sir, I remember the language.
160 Q. Is that the language you used in the telegram to him?
A. As near as I can remember, I think it is.
Q. Look over it carefully and see whether there is anything in that paper that was not contained in your message to him?
A. As near as I can remember, I think that is correct.
Q. As to date as well as to matter?
A. Pardon me, but I cannot say exactly as to the date.
Q. How about the signature?
A. I usually signed the messages in that way.
Q. Now, that way is?
A. S. B. G.
Q. Are those your initials?
A. Yes sir.

Plaintiff offers this telegram in evidence.
Defendant objects to the offer of the telegram because the same is incompetent, irrelevant and immaterial, and is not the best evidence.

Q. Have you the original telegram, if this is not the original telegram, in your possession?
A. I have not, but it should be in the files of the company.
Q. Have you control of those files?
A. No sir.
Q. Who has control of those files now?
A. Mr. Robert Law, the president.

Plaintiff makes demand upon the company to produce the original telegram.
By Judge LAUGHLIN: "We will see what we can do."

Q. Mr. Grimshaw, who was the car repairer and inspector, if you had any on the road at the time?
A. I think his name was Joe Harris.
Q. Are you familiar with his signature?
A. No sir, I am not.
161 Q. Do you know whether you received a telegram or a report from Mr. Harris subsequent to this alleged injury?
A. Yes, I did.
Q. Would you recognize that report if you should see it?
A. I think I would.

Q. Look at this (handing witness paper.)
A. Yes, I remember the language.
Q. Where did you receive that report?
A. As near as I can remember it, I received the report by mail, I think from Mr. Harris, after the accident.
Q. How long after the accident?
A. Well, I could not be positive of that, but possibly four or five or six days.
Q. How did you come to receive that report, do you know?
A. If I remember rightly, I wired Mr. Zink or Mr. Harris to send me an inspection report of the train when the car inspector inspected the train at Estancia.
Q. And is that the response?
A. I think so, yes, I think so, as near as I can remember.

Plaintiff offers this paper in evidence.
Defendant objects to the offer of this paper because the same is irrelevant, incompetent and immaterial, and so far as the proof shows is not the best evidence.
By Mr. PRICHARD: "May it please the court, this paper occupies the same position as the other one, but I will make the same request of the defendant to produce the original.

Q. Mr. Grimshaw, I wish you would look at this book which I hold in my hand which on the front page has the words,
162 "Rules and Regulations for the Government of Employés of the Operating Department," and tell us what those rules are. (Handing witness book.)
A. These are the rules of the Chicago, Rock Island and Pacific Railway Company, which I adopted for the Santa Fe Central by issuing a circular and distributing the books, and having examination given to each man who was in the train service in proper time on the rules.
Q. Then those were the rules you established as the Assistant Manager of the company?
A. Yes, sir.
Q. I will call your attention to page 95 of the Rules, and to the last paragraph on that page, and ask you whether that rule was in force at the time of this alleged injury to the plaintiff (Handing witness book)?
A. I am not positive that these rules were in effect at the time of this accident, but I think they were, and all of the rules in this book in every particular, applied to the operating, or any other department which they mention.

Plaintiff here offers in evidence the last paragraph of the rules on page 95 of the book to which the witness refers, and asks the interpreter to read the paragraph to the jury.
Interpreter reads paragraph to the jury as follows:
"Brakemen must stop their trains at stations and control them in descending heavy grades without waiting for a signal from the Engineman, and must be careful to void the sliding or heating of the wheels."

Q. Were these rules in force on the first of December, 1906, Mr. Grimshaw?

A. As near as I can remember, I think they were.

Q. Look at this paper which I hand you, Mr. Grimshaw, and state whether that is the circular to which you refer (Handing witness paper)?

A. Yes, sir, I issued this circular October 22, 1904; that is my circular word for word.

163 Q. Now, what do you say as to these rules being in force on the first of December, 1906?

A. Yes, sir, they were.

Plaintiff here introduces this paragraph in evidence.

Defendant objects until Mr. Grimshaw shows his authority to make these rules.

Objection overruled.

Defendant excepts.

Plaintiff asks that this be marked as Exhibit "E."

Q. M. Grimshaw, while you were acting as assistant to the general manager of the road, do you know whether the rolling stock of the Santa Fe Central Railway Company was inspected by the inspector of the Interstate Commerce Commission of the United States?

Defendant objects because the same is irrelevant, incompetent and immaterial.

Objection overruled.

Defendant excepts.

A. Yes, I think it was.

Q. What makes you state that you think it was?

A. Because I received from President Andrews an inspection report with a letter attached, if I remember right, from the secretary of the Interstate Commerce Commission at Washington, giving the initials and numbers and the defects on certain cars.

Q. As to what railway?

A. As to the Santa Fe Central Railway.

Q. Do you remember about the date of the receipt of that paper?

Defendant objects to the witness testifying about contents of papers unless he has got them, and moves to strike out that part of witness' answer where he refers to defects in certain cars.

Objection overruled.

Defendant excepts.

164 Q. The date with reference to the first day of December, 1906, whether before or since that date?

A. I am unable to say positively, I think it was about two years ago, to the best of my recollection.

Q. About two years ago?

A. I think so.

Q. Have you possession of that paper now, Mr. Grimshaw?

A. No, sir.

Q. Where was that paper when you saw it last?
A. In the general office of the Santa Fe Central Railway Company in Santa Fe.
Q. State whether or not when you left the office, the paper was left there?
A. Well, it should be there, I could not swear it was there, but I had it frequently.
Q. Did you take it away with you?
A. No, sir.
Q. When did you say you left the Santa Fe Central Railway?
A. July 6, 1908.
Q. Have you a copy of that paper or report?
A. No, sir.

Plaintiff makes the same demand for the defendant to produce the paper described by the witness.

By Judge LAUGHLIN: "What is that paper?"
By Mr. PRICHARD: "It is a report by Inspector of engines, cars and equipments under the instructions of the Interstate Commerce Commission of the United States."
By Mr. EASLEY: "I will state to the court that among the papers turned over to me, there was no such paper."

Cross-examination.

(By Judge LAUGHLIN:)

Q. Mr. Grimshaw, examine this book and state what it is, in connection with this circular (Witness handed book and paper)?
165 A. It is a book of rules and regulations for the government of employés of the operating department of the Chicago, Rock Island and Pacific Railway Company, and was adopted on October 22, 1904, by the Santa Fe Central Railway Company.
Q. I understood you to say that these rules were all in force on December 1, 1906?
A. Yes, sir, as far as I can remember.
Q. That includes Rule 708 on page 94 of this book?
A. Yes, sir, it includes every rule.

Defendant here tenders this rule 708 on page 94 and asks that it be marked Defendant's Exhibit "7" for identification.

Q. Mr. Grimshaw, I will ask you to examine this paper and state what it is, and whether it was in force on December 1, 1906 (Witness handed paper)?
A. Yes, I think so.
Q. To the best of your recollection these rules were all in force December 1, 1906?
A. I do not remember of ever cancelling that circular or order at all.

Defendant here offers paper for identification and asks that it be marked Defendant's Exhibit "8."

Q. Who was the President of the Santa Fe Central Railway Company at that time, December 1, 1906?
A. W. H. Andrews.
Q. And what was your position?
A. Assistant to the President, and General Manager.
Q. You had authority, then, to prescribe these Rules and Regulations for the management of the trains, had you?
A. Yes, I thought so.
Q. You did do it and they were acquiesced in all the time, is that not a fact, Mr. Grimshaw?
A. Well, they either had to acquiesce or I would discharge them, that is all.
166 Q. Well, that is what I mean, they were under your control?
A. Yes, sir.
Q. I will ask you to refer to Rules 105 and 106 in the same book, on page 37, Mr. Grimshaw, and ask you if those were also in force at that time?
A. Yes, sir.

Defendant asks that these rules be marked for identification Defendant's Exhibit "9."

C. A. BISHOP, called as a witness in behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

(Questions by Mr. PRICHARD:)

Q. What is your full name?
A. Carl Allen Bishop.
Q. Where do you reside, Mr. Bishop?
A. Here in Santa Fe.
Q. How long have you been residing in Santa Fe?
A. Twenty-four years, all my life.
Q. What business or occupation are you engaged in?
A. In the general insurance business.
Q. Life and fire insurance?
A. Life, accident and fire.
Q. How long have you been in the life insurance business?
A. I have been in the insurance business for myself three years.
Q. Were you in the life insurance business in connection with anyone else before you went into business for yourself?
A. I was.
Q. Mr. Bishop, what life insurance companies or associations do you represent?
A. The Mutual Life Insurance Company of New York.
167 Q. State whether or not that is one of the standard companies.
A. Yes, sir, it is.
Q. State whether you have mortality tables of that company showing the expectancy of life of persons.
A. I have.

Q. Will you produce those tables?
A. Yes, they are here. (Witness produces book.)
Q. Will you turn to the tables there and look at the tables with reference to the age 19?
A. It only goes back to 20.
Q. Well, look at the age 20 and state what the life expectancy of a person in good health is at that age?

Defendant objects because it calls for information as set by one insurance company and is not general, and because the same is incompetent, irrelevant, and immaterial.
Objection overruled.
Defendant excepts.

A. The Combined Experience and the American Experience are given separately. The Combined Experience gives the expectation of life and years at 20 as 41.49 years. The American Experience gives the years at age 20——

By Judge LAUGHLIN: "I object to the introduction of any Combined Experience: it should be confined to the American Experience table at the age 20 years.

A. (Continued:) The expectation of life and years as 42.20 years.

Cross-examination.

(By Judge LAUGHLIN:)

Q. What do you base that expectancy on, Mr. Bishop? On the American Experience?
A. It is the Spectator Company of New York City.
Q. Of what class of people does that expectancy apply to?
168 A. All people insured.
Q. It just applies then to those who have been insured, not to the general expectancy of life?
A. Not those who are insured, all life taken together.
Q. Of both sexes?
A. Yes, sir.
Q. Then is that a general mortality table?
A. Yes, sir.
Q. Was it prepared by an Actuary?
A. Yes, sir.
Q. Who was the Actuary who prepared it?
A. I do not know the name of the Actuary employed by the Spectator company of New York.
Q. Is that the mortality table used by any particular company?
A. By all insurance companies in general.
Q. But there are other insurance companies using different mortality tables, are there not?
A. Yes, I believe there are.
Q. They do not all use the same mortality tables?
A. Well, I suppose that the companies that use the different ones are the ones that they get up from the people they insure.

Q. You say you do not know the name of the Actuary who prepared this table?
A. No, sir, I do not.
Q. And what did you say the expectancy of life is of a person aged 19?
A. At age 20, 42.20 years.
Q. And that applies to both sexes?
A. Yes, sir.
Q. Well, does it apply to any particular vocation, or companies, or is it general for the United States?
A. The last one which I gave is the American Expectancy table and confines itself to America.
169 Q. Well, is that general for the United States for both sexes and for all people?
A. Yes, sir.
Q. Regardless of employment or anything of that kind?
A. I understand it that way, yes, sir.
Q. The number surviving at each age?
A. They do not state how it is; they simply give it as general, men and women both; they do not start in younger than 20 years.
Q. Do you know what the general average of human life is according to these mortality tables?
A. Why, it is about 33 years, I think.
Q. Now, is it not a fact, Mr. Bishop, that this mortality table is made on the theory of insurance and taken from those who are insured and that the data is made up for this table principally from insurance records?
A. I could not say.

By the COURT:

Q. Is there any difference in the expectancy of life between persons, say engaged in railroading, and other parties?
A. There is no distinction at all, the classes are all made together.
Q. This is an average, as I understand it?
A. Yes, sir.

By Judge LAUGHLIN:

Q. Mr. Bishop, can you explain why the expectancy of human life on the general average is 33 years, and that according to this mortality table it is something over 42 years?
A. No, sir.
Q. So they start with these people who have been insured, and generally applicable to the male sex, and those who have lived up to 20 years?
170 A. The expectancy table simply starts from the age of twenty, after a person reaches the age of twenty.

Redirect examination.

(By Mr. PRICHARD:)

Q. What is the expectancy of life by those tables, of a man twenty years old?

A. 42-40 years.

Q. You say those are the rules, or the tables I should say, mortality tables of what company?

A. The Spectator Company.

Q. What companies adopt these mortality tables in the United States?

A. The American Life Insurance Companies adopt these tables.

Q. Now, what I want you to do is to name some of those companies?

A. Well, there is the one that I represent, the Equitable Life Assurance Company of New York, the New York Life Insurance Company, the Mutual Benefit Life, the Provident Savings Life Insurance Company, the Phœnix Mutual Life Insurance Co., Penn. Mutual Life Insurance Co., the Northwestern Mutual Life Insurance Co., the North American Life Insurance Company, National Life and Trust Co., Massachusetts Mutual Life Insurance Co., Manhattan Life Insurance Co., Kansas Mutual Life Insurance Co., the Interstate Life Insurance Co., the Home Life Insurance Co., the German Life Insurance Co., the Federal Life Insurance Co.

Q. Now, all these companies adopt these mortality tables and fix the expectancy of life of one at the age of twenty, to be 42.20 years?

A. Yes, sir.

Q. Now, let us get it clear before the jury; those tables mean that one will live 42.20 years from the age of twenty?

171 A. From the age of twenty.

Recross-examination.

(By Judge LAUGHLIN:)

Q. Is it not a fact, Mr. Bishop, that this expectancy is based entirely upon the lives of those who have been insured?

A. This is a general expectancy table.

Q. Well, now, where did this Spectator Company obtain the data if it did not obtain it from insurance companies?

A. I could not say where they obtain it.

Q. Now, if that is the case, then this expectancy is based upon the lives of those who have been insured, and after an examination and after they have passed a physical examination as to their health?

A. No sir, this is an expectancy table on all people taken together, not those examined for life insurance.

Q. Well, now, how can you show that?

A. I simply cannot show it except what I have got here. It just simply gives me the expectancy of so many lives, so many die to the thousand, either the American or the combined.

Q. Now, is that not based upon data taken from insurance records?

A. It gives no records here at all taken from insurance companies.

Q. Do you say now that an insurance company would adopt a mortality table that was made up from the data given in the national census?

A. I did not say they would.

Q. Well, they could not get this data to make up this expectancy of life from any other source, if they did not get it from the insurance companies, or statistics made from census reports made by the government?

172 A. Well, I should say that it had been taken from the national census report then, because it gives no information in regard to being taken from the life insurance companies.

Q. But as a matter of fact you do not know where this Spectator Company obtained its information to make this table, do you?

A. No sir.

Redirect examination.

(By Mr. PRICHARD:)

Q. Mr. Bishop, are not these tables the result of long experience by these companies in considering the expectancy of human life?

A. Yes sir.

Q. Is it not the combined experience of all standard life insurance companies?

A. It is.

Q. And these mortality tables are the result of all that combined experience?

A. Yes sir.

Q. And are adopted by these standard companies to which you have referred?

A. Yes.

Q. And is it not true that the expectancy of life as shown by these tables is nearly as accurate as can be made?

A. Yes sir, from experience as accurate as possible, from long years' experience.

Recross-examination.

(By Mr. LAUGHLIN:)

Q. Where did this information of long experience come from, Mr. Bishop, what was the start of the information upon which this table was made?

A. I do not know, Judge, I was not there.

173 Q. Then you do not know much about the experience, the length of it or where it came from.

A. My book states that it was from a great many years' experience that they adopted these mortality tables.

Redirect examination.

(By Mr. PRICHARD:)

Q. And you go by your book?

A. Yes sir.

Recross-examination.

(By Judge LAUGHLIN:)

Q. That is all the information you have, just from that book?

A. Yes sir.

By Mr. PRICHARD: "This is a copy of an affidavit served on the Santa Fe Central Railway company by the sheriff of this county under an act that is entitled the Practice Act, which was supposed to have some life in it some years ago, before the Congress of the United States disapproved it, but it was in force at the time this suit was brought. I would like to introduce copy of affidavit of that Service Act."

By Judge LAUGHLIN: "If the court please, I object to the introduction of this paper, first, because it relates to a procedure prescribed by a law which is now out of existence, as I understand, and secondly, because that was Territorial Law and is no longer in force, nor does it in any way apply to the issues in the case at bar, and third, because it is incompetent, irrelevant and immaterial; it tends to serve no purpose in the world in this case, except to encumber the record and make expense; it seems to me that it is highly out of place to admit a paper there is nothing in for either side. If
174 he had brought the case under the Territorial statute, then there might have been some ground for it."

By the COURT: "The objection is good because this law in the first place was void because Congress has declared it so."

By Mr. PRICHARD: "I tender the affidavit and the court can sustain the objections but I will take an exception and make the record."

Objection sustained.

Plaintiff excepts.

(Paper tendered and marked Exhibit "F".)

JOHN W. MAYES, called as a witness in behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

(Questions by Mr. PRICHARD:)

Q. State your name.
A. John W. Mayes.
Q. Where do you reside, Mr. Mayes?
A. Santa Fe, New Mexico.
Q. What business are you in?
A. Insurance business.
Q. Are you in the life insurance business?
A. Yes.
Q. What companies do you represent?
A. I represent the Northwestern Mutual and the New York Life.
Q. Have those annuity or mortality tables showing the expectancy of life?
A. They have.
Q. Now, when you speak of the expectancy of life, what does that refer to?
A. It means the number of years that a person is expected to live on any given age.
Q. What are those tables based upon?

A. I really could not say.

175 Q. What has experience of life insurance companies to do with it; how do they arrive at this expectancy?

A. Why, they got it from statistics some way or another; I do not know how they arrive at it.

Q. Have you any of those tables with you?

A. Yes sir, I have the Northwestern Mutual Life Insurance Company rate book.

Q. What companies did you say you represent?

A. The Northwestern Mutual Life of Milwaukee, and New York Life of New York.

Q. Are they standard companies?

A. Yes sir.

Q. Now, will you turn to your mortality tables, turn to the age of twenty, and show what the expectancy of life is from that age?

A. At age twenty, the expectancy would be 42 and one-fifth years.

Q. Now, do I understand you that the expectancy is the average time life will continue from 20 years?

A. Forty-two and one-fifth years longer.

Q. What tables are those that you refer to?

A. It is marked here, "The American Table of Mortality."

Q. Which is adopted and in use by all the standard life insurance companies?

A. I think so.

Q. Of this company, but especially the companies you represent which are standard companies?

A. Yes sir.

Cross-examination.

(Questions by Judge LAUGHLIN:)

Q. Mr. Mayes, how long according to that table did you say a man will live, that is, what is his expectancy of life?

A. Forty-two and one-fifth years.

176 Q. Is that from the time he is born, or from the time he is twenty years old?

A. That is from the time he is twenty, making him 62 and one-fifth years.

Q. What is the general average of human life according to those expectancy tables?

A. I do not think that this table gives it; I would not have the slightest idea otherwise.

Q. So you say that table then gives the average human life at 62 and one-fifth years?

A. No sir, I did not say that. I said at the age of twenty his expectancy was 42 and one-fifth years, which would make him 62 and one fifth years.

Q. Well, that is what I say, that is the expectancy of human life?

A. Yes sir, for a man who had lived to be twenty years of age.

Q. Then the expectancy of life, according to that table, of all

men who have lived to be twenty years of age, is 62 and one-fifth years.

A. According to that table.

Q. Well, don't you know from general information what the general average of human life is?

A. I do not.

Q. What company prepared this table that you are referring to?

A. It is taken from the rate book of the Northwestern Mutual Life Insurance Company, and marked "American Table of Mortality."

Q. Well, did that Insurance Company prepare that table?

A. I do not suppose they did, but I would not say; it is marked "American Table of Mortality"; I presume that they got it from some bureau that gathers such statistics for life insurance companies.

177 Q. Then neither of the life insurance companies which you represent, use as their mortality table the mortality table prepared by the Spectator Company of New York?

A. Both of these companies use the American.

Q. Do you know what person or company prepared that table?

A. I do not, no sir.

Q. Then so far as you know, there are only two companies that use that table?

A. As far as I know, yes sir.

Q. Then that is not a general mortality table?

A. I could not say as to that.

Q. And so far as you know then, it is confined to two life insurance companies?

A. So far as I know.

Defendant moves to strike out the testimony of this witness on the ground that the mortality table referred to is special and not general.

Objection overruled.

Defendant excepts.

Redirect examination.

(Questions by Mr. PRICHARD:)

Q. Now, look at the top of that book and what does it say there?

A. It says "The American Table of Mortality."

Q. Now, do you understand that that is confined to just these two companies that you represent?

A. I should not think so, they could not afford to get it up.

Q. Then it applies to all the standard companies?

A. I think so.

Q. Now, Mr. Mayes, I wish you would tell us what the life expectancy of a man is at age 30?

A. 35¼ years.

Q. What is the life expectancy of a man at age 40?

A. 28 18-100 years.

178 Q. Now, about the age of 50, what is the life expectancy?

A. 20 91-100 years.

Recross-examination.

(By Judge LAUGHLIN:)

Q. You say the company could not afford it to get up that book if it was the only company that used it; what company got it up?

A. It is marked "The American Table of Mortality"; I said I did not suppose that they could afford to get it up if only one company used it.

Q. Now, do you suppose that that company got up that table?

A. I do not have the least idea that they did.

Q. And you have not any idea who did get it up?

A. Nothing more than what it says here, the American Experience Mortality Table.

Q. And you know of only two companies that are using that?

A. That is all I know of.

Q. Now, is it not a fact, Mr. Mayes, that the approximate average of human life is about 33 years?

A. I am not posted as to that.

Q. Now, on what is this based, this mortality table, just on the lives of those who have insured in life insurance companies, or from what source did this information come?

A. I presume that it is based on statistics gathered by people engaged in that business. I could not say.

Q. Well, did the statistics that you refer to, is that the national census, or is it the statistics of insurance companies on the lives of people?

A. I do not know that it is either.

Q. Well, can you tell where they did get this information?

179 A. No sir.

Q. You cannot tell whether it is correct or not?

A. No sir.

Q. And you cannot tell why the expectancy of life is laid down so much longer in this table than in the general mortality of human race, or the general expectancy of human life?

A. No sir.

Q. Well, now, is it not a fact, Mr. Mayes, that this mortality table is made exclusively from those who have passed examination in insurance companies and passed the age of 20 years?

A. I could not say.

Q. Well, does it apply to men and women alike, or the uninsured or the insured, which?

A. We take insurance for both male and female so I presume it includes both. These is no separate table made for females.

Q. Does this apply to any other class of people except those who have passed examination for life insurance?

A. That information is not given in the book there which I read.

Q. Well, that is a matter of general information, isn't it; the average human life?

A. I presume so.

Q. And then the statistics from which these mortality tables are made up?

A. I presume it is a matter of general knowledge?
Q. But you do not know anything about the source of information except what you see in this table here?
A. Nothing more than is contained in this rate book.

Redirect examination.

(Questions by Mr. PRICHARD:)

Q. Have you any occasion to doubt the accuracy of these tables?
180 A. Not the slightest.

Recross-examination.

(Questions by Judge LAUGHLIN:)

Q. Have you any reason to believe it to be correct?
A. Yes sir, I have.
Q. Why?
A. Well, the same reason that I have to believe any statistics.
Q. Do you believe that every table of statistics that you see to be correct?
A. Reasonably so.
Q. That is your faith in human knowledge, is it, in compiling statistics?
A. Yes sir.
Q. You have unbounded faith then in statisticians, have you?
A. I would not say that I have unbounded faith, but I have a reasonable amount of faith in statistics gathered by companies for that purpose.
Q. But you do not know anything about whether or not this is correct, only believe it is?
A. I believe it is.

The court here adjourned until 10:00 A. M. September 18, 1908.

Pursuant to adjournment the court met at 10:00 A. M. September 18, 1908.
Present, as of yesterday.

By the COURT: "Colonel Prichard, I have concluded to say to you this morning that if you will re-offer that notice that you offered on yesterday, I will be disposed to entertain it, not that I believe there is any necessity for it, but still it being a matter of practice, it might be possible that it might be a precautionary measure that you are entitled to."

Plaintiff's attorney here again offers the copy of an affi-
181 davit of the plaintiff dated the 2nd day of February, 1907, with the Sheriff's return thereon as having been served on the defendant company on the 2nd day of February, 1907. This affidavit being offered under the provisions of the law known as the Hawkins Practice Act, which shows for itself, and asks that the same be marked Exhibit "F".

Defendant objects to the offer in evidence of the paper tendered by the plaintiff, first, because the same is irrelevant, incompetent and immaterial, and second, because the same tends only to incumber the record, and third, because the law requiring the same was an act of the Legislative Assembly of the Territory of New Mexico, approved March 11, 1903, and has been disapproved and declared null and of no effect by an Act of Congress of the United States, approved May 13, 1908.

By the COURT: "I am disposed to believe that this objection is good, and that the law was not valid from the time it was enacted, but inasmuch as the Act under which this case is being tried, refers back to a law existing while this Practice Act was in force, I have concluded to overrule the objection as a matter of precaution. The objection will be overruled, and the paper will be admitted as evidence."

Defendant excepts.

By Colonel PRICHARD: "Did you make any discovery as to those documents requested?"

By Mr. EASLEY: "If the court please, I made search in the files in the office of the Santa Fe Central Railway, and I found what appears to be the original of one of the telegrams offered, to which is purported to be signed the name of Joseph Harris, but whose signature I am not familiar with and do not know anything about its genuineness. I have it attached to the alleged copy which was handed me by Colonel Prichard. I have been unable to find
182 the original of the alleged telegram sent to Joseph Harris, which appears to have been dated 12-3 without any year, and signed S. B. G. This I am unable to find any original of, but it appears to be a copy of a telegram received at Estancia. I will state to the court that I had two men in the office make diligent search for the original of this, and am unable to find it. This is the paper handed me by Colonel Prichard. I found among the files a letter dated December 30, 1906, addressed to S. B. Grimshaw, General Manager, Santa Fe, New Mexico, and signed by W. H. Andrews, President and General Manager, which appears to have been written from the House of Representatives at Washington, which refers to a letter which is attached, (to which Colonel Prichard objected to having read to the jury.)

By General EASLEY: "As I understand, it is what you called for, and I simply want the court to know that I had complied with the instructions of the court in the matter." (Paper handed to Colonel Prichard for examination.)

By Mr. PRICHARD: "As I understand, these are the papers that you have been able to produce under the request of yesterday?"

By Mr. EASLEY: "Yes; I will add that those are the only papers that I have been able to find in the office relating to any report by the United States Commerce Commission; we have searched the files thoroughly for the last three or four years."

By Mr. PRICHARD: "I would like to have the record now show that one of the attorneys of the defendant states in open court that the files of the Santa Fe Central Railway Company have been thor-

ougly searched for the original of the telegram dated 12-3 and signed S. B. G., and same cannot be found; thereupon the attorney for the plaintiff re-offers a copy of the telegram as testified
183 to by Mr. Grimshaw on yesterday. We now offer a copy of the telegram referred to in his testimony, and ask that the same be marked Exhibit "G."

To which the defendant objects on the ground that the same is incompetent, irrelevant and immaterial.

Objection overruled.

Defendant excepts.

By Mr. PRICHARD: "I will ask the interpreter to read this telegram."

Interpreter reads the telegram as follows:

"Go vo ko. S. Fe. 12

Joe Harris, 3
Car Repairer.

Train 2 Dec. 1st, car- 618 and 621 passed Estancia with defective brakestaffs and wheels; why did you allow this, answer.

S. B. G. 114a"

By Mr. PRICHARD: "Now, I will offer the original paper from Harris, which was referred to by the witness Grimshaw as being in response to the telegram just read."

Defendant objects to the paper offered by the plaintiff because the same is incompetent, irrelevant and immaterial, and further because the paper signed by Joe Harris attempts to define what a standard brakestaff was, and there is no proof showing that he had any sufficient knowledge upon which to base such statement.

By Mr. PRICHARD: "Mr. Easley, one of the attorneys for the defendant here, stated in open court that the paper dated Dec. 5, 1906, signed Joseph Harris as car repairer and inspector, and marked "H" in red ink, appeared to be the original copy, and was found in the files of the office of the Santa Fe Central Railway company: thereupon the attorney for the plaintiff upon the
184 statement of facts, offers the paper referred to in evidence as being the original of the paper shown to the witness Grimshaw on yesterday, and which paper he admits having received from the party named above while he, Grimshaw, was the Assistant General Manager of the Santa Fe Central Railway Company."

Defendant further objects because the said Joe Harris attempts to make statements in the paper referred to and offered to the effect that "there was no place for a nut as per standard."

Defendant submits that those are statements made by a man who had no authority to make them, and are contrary to the testimony offered here by the plaintiff in this case with reference to brakestaffs.

The interpreter read the paper to the jury, which is marked Plaintiff's Exhibit "H", a true copy of which is as follows:

"H" ESTANCIA, *December* 5, 1906.

"Inspection Report of Joe Harris on Train Two December 1st, 1906.

All the rack cars in Train Two on December 1st, had defective brakestaffs, in that they had been cut off from 12 to 15 inches below standard height and the wheel-end left with a square head and no place for a nut as per standard. The other cars in this train were O. K.

(Signed) JOE HARRIS,
Car Repairer and Inspector."

E. E. FRIDAY, re-called to the stand to testify in behalf of plaintiff.

Direct examination.

(Questions by Mr. PRICHARD:)

Q. Mr. Friday, you have stated the age of your brother here, Harry, I would like to ask you what his habits were at the
185 time, and before this accident, as to sobriety, etc.?

A. Why, they were first-class as far as I know.

Q. What do you mean by that, Mr. Friday?

A. Well, I never seen him take a drink, or under the influence of liquor at all during the time he was here.

Q. What was his habits as to industry and perseverance?

A. He was always very industrious whenever he was with me, eager to learn.

Q. Did he seem to be anxious to learn railroading?

A. He did.

Cross-examination.

(Questions by Judge LAUGHLIN:)

Q. When was the plaintiff, Harry S. Friday, born, Mr. Friday?

Plaintiff objects, it is not cross-examination.
Objection sustained.
Defendant excepts.

Q. How long had you been with him prior to the time he entered the service of the defendant company, continuously?

A. Why, not at all, not to exceed two weeks at a time.

Q. You had been with him two weeks continuously before he entered the service of the defendant company?

A. As near as I can remember.

Q. And how long had it been prior to that time that you had been with him?

A. I do not remember exactly.

Q. Well, about how long?

A. Well, I should judge two years.

Q. Now, how old was he when he came here to enter the service of the company?

186 A. Nineteen.
Q. Past nineteen?
A. He was.
Q. He was past nineteen, was he?
A. He was.
Q. When did he enter the service of the company?

By Mr. PRICHARD: "I certainly shall object because these matters have been gone into fully upon examination of this witness in the beginning."
Objection sustained.
Defendant excepts.

By Judge LAUGHLIN: "The records will show that I reserve the right to recall Mr. Friday for further cross examination."
By the COURT: "Well, putting it on that ground, he has a right to answer because this matter was gone into on direct examination."

Q. And you know nothing about the plaintiff only about two weeks continuously prior to the time he entered the service of the company?
A. Yes sir.
Q. You said you never saw him drinking any whiskey, I believe, or intoxicating liquors of any kind?
A. Yes sir.
Q. He might have drunk and you would not have known it?
A. No doubt I would have known it if I had been around him, or he had been drinking while around me.
Q. But he might have drank and you would not have known it?
A. Well, if he did drink I did not know it.
Q. But he might have drunk and you not know it?
A. Well, I could not say as to that.
Q. Smoke cigarettes?
A. I never saw him smoke cigarettes.
Q. Does he smoke cigarettes now?

Plaintiff objects; it is immaterial whether he does or not.
Objection sustained.
Defendant excepts.

Q. He is in good health now, is he?

187 Plaintiff objects, that is not cross examination. It is immaterial.

By Judge LAUGHLIN: "I recall the witness then for further re-cross examination."

By Mr. PRICHARD: "I object then, your honor, because it is immaterial about the plaintiff's health at this time. The question as to his health relates to the condition at the time this injury was received, and we have only shown the permanent injuries that this plaintiff has received; we have not gone into the question of his health at all this side of the accident.
Objection overruled.
Plaintiff excepts.

A. He is as far as I know.

Q. Has been in good health all the time since he got over his injuries?

A. Yes sir, so far as I know.

Q. I will ask you again, Mr. Friday, if you know when the plaintiff was born?

A. Well, personally, I do not.

Q. Do you know his birthday?

A. Well, there is only one way I can tell if you want me to explain it, how it is.

Q. Explain it.

A. Well, by the affidavit my father gave me; it was on the 28th day of October, but I forget the year now.

Q. I will show Mr. Friday the affidavit. (Handing witness paper.)

A. Yes, that is a copy of it, October 28, 1887.

Q. It was through your influence that the plaintiff was employed as brakeman by the defendant company road, was it?

A. Well, I cannot say that it was.

Q. You requested the General Manager, Mr. S. B. Grimshaw, to give him employment as brakeman, didn't you?

A. I did not request him, I spoke to him about it.

Q. What did you say to him about it?

Plaintiff objects.
Objection sustained.
Defendant excepts.

188 Q. You knew that the defendant company had a rule forbidding the employment of minors without release or permission from their parents or guardian?

Plaintiff objects, that is immaterial.
Objection sustained.
Defendant excepts.

Q. I hand the witness a circular offered heretofore for identification and marked Exhibit "8"; (handing witness paper) Mr. Friday, state whether or not that circular, or an exact copy of it was served on you, and that you had it in your possession all the time, or knew of it while you were acting as Conductor on the defendant railroad and prior to the time of this accident?

A. Well, I cannot say as to this particular circular, no, it might have been and it might not have been.

Q. You say that you never saw that circular before?

A. No, I will not say so.

Q. You never saw one which purported to be a correct copy of it, or duplicate?

A. I would not say that, I said I might have and I might not.

Q. You are in the employ of the defendant company at this time, are you not, Mr. Friday?

A. I am.

Q. And have been continuously for how long?

A. Since the first day of June, 1904.

Q. What salary does the company pay you at the present time by the month, or how do you receive your pay, by the day or by the month?

A. By the month.

Q. How much by the month do you get?

A. One hundred and ten dollars.

Q. How much did you get since you have been employed by the month?

A. Anywhere from $75.00 to as high as—well, I do not know exactly.

Q. Well, approximately.

A. It was upon a regular salary and the over-time.

Q. But it runs from $75.00 a month up to about how much?

A. At present I am drawing $110.00 a month.

Q. And over-time?

A. Yes.

189 By Mr. PRICHARD: "Now, I shall object to going into this any further, I shall object to any further questions."

Q. About how much does your over-time amount to?

Plaintiff objects, it is immaterial, irrelevant, and has nothing to do with this case.

Objection sustained.

Defendant excepts.

Q. Did you vouch for the plaintiff when he entered the employ of the company, as to his character, his age and his competency as brakeman?

Plaintiff objects, as it is irrelevant and immaterial.

Objection sustained.

Defendant excepts.

Redirect examination.

(By Mr. PRICHARD:)

Q. Mr. Friday, after this injury occurred, did you tender your resignation as conductor to the company?

A. I did.

Q. Would they accept it?

A. They would not.

Recross-examination.

(By Mr. LAUGHLIN:)

Q. To whom did you tender that resignation?

A. Mr. S. B. Grimshaw.

Q. When did you tender it?

A. I do not know just the exact date, but it was very shortly after the accident happened.

Q. What reason had you for tendering your resignation as Conductor of the defendant company?

By Mr. PRICHARD: "Answer fully why, Mr. Friday."

By Judge LAUGHLIN: "I object, if the court please, and take exception to the counsel for the plaintiff suggesting to the witness while I am cross-examining him as to how he shall answer."

By Mr. PRICHARD: "I simply told him to answer fully, which I do not see any objection to."

Objection sustained.

Plaintiff excepts.

190 A. Why, Mr. Grimshaw requested me to make answers to certain statements outside of the regular personal injury report, which I refused to do.

Q. And you still continued in the service of the company and are in the service of the company at this time?

A. So far as I know.

Q. Did you tender your resignation in writing?

A. No.

Q. That was in February, 1907, was it?

A. I do not just remember the date.

Q. Well, it was two months or about that after the accident occurred, was it not?

A. I could not say, it was shortly after the accident happened.

Q. You spent a good deal of time in looking up this case and preparing for this trial, have you?

A. Well, I cannot say that I have.

Q. But you have given it a good deal of attention, have you not?

A. I have probably given it more or less.

Redirect examination.

(By Mr. PRICHARD:)

Q. Mr. Friday, what did Mr. Grimshaw say to you when you offered your resignation?

By Judge LAUGHLIN: "Object if the court please. Mr. Grimshaw is right here and he can testify to it; he is their witness."

Objection sustained.

Plaintiff excepts.

Q. I will ask you this question; state whether or not Grimshaw declined to accept your resignation?

A. He did.

By Mr. PRICHARD: "Your honor, this is the case for the plaintiff, and we rest, reserving the right, of course, to offer any rebutting testimony.

Defendant's attorney requested that the jury retire for a time.

By the COURT: "Let the jury retire for a time."

Jury retired.

By Judge LAUGHLIN: "The plaintiff having closed his case, comes

now the defendant and demurs to the evidence thus far
191 offered by the plaintiff, and for grounds of its demurrer states and shows to the court that this case was filed in this court under and by virtue of an Act of Congress of the United States, approved June 11, 1906, and this court is without any jurisdiction to hear, try or determine this case, because:

First. The Act of Congress above referred to, approved June 11, 1906, under which this case was brought, and is now being prosecuted, is unconstitutional and void, because the same is not a regulation of commerce as defined by the Constitution of the United States.

Second. Because the said Act of Congress is unconstitutional and void with respect to the action at bar because it draws no destinction between Interstate Commerce and Intrastate Commerce, and if it is a regulation at all, it attempts to and does regulate Interstate as well as Intrastate Commerce, and is for that reason void.

Third. Because the proof shows that the defendant railway company is entirely within the Territory of New Mexico.

Fourth. Because the Supreme Court of the United States has held and declared that the Act of Congress, approved June 11, 1906, under which this case was brought and is being prosecuted, was unconstitutional and void.

Fifth. Because the Act of Congress, approved April 22, 1908, wherein it attempts to say that "this act shall not be held to limit the duty or liability of common carriers, or to impair the rights of their employés under any other act or acts on Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled 'An Act Relating to Liability of Common Carriers in the District of Columbia and the Territories, and to Common Carriers engaged in Commerce between the States and between the States and Foreign Nations and their employés' ", approved June 11, 1906, is retroactive in so far as it attempts to apply to any rights or suits which originated under and by virtue of the Act of Congress, approved June 11, 1906, and this court has not any jurisdiction to hear, try or determine this case under the said Act of Congress of the United States, approved June 11, 1906, which act is and has been held to be declared unconstitutional and void, and the act approved April 22, 1908, is retroactive as to this suit which was brought under the Act of June 11, 1906, and is retroactive and void.

192 Sixth. Because the testimony offered in this case is insufficient to support the allegations in the complaint:

Wherefore, the defendant moves the court to instruct the jury to return a verdict for the defendant."

By the COURT: "The motion to instruct will be overruled."

Defendant excepts. Jury recalled.

The defendant here opened its case by its statement to the jury, through its counsel.

By Judge LAUGHLIN: "I will first offer, if the court please, a paper which is the report of E. E. Friday, and dated December 1,

1906, and has been offered for identification as Defendant's Exhibit "1".

By Mr. PRICHARD: "I object to the report and would like to have the gentleman indicate for what purpose this report is offered."

By Judge LAUGHLIN: "If the court please, I offer it for what it is worth as being testimony in this case. It is a report made by his own witness, your honor, in his capacity of conductor.

Objection overruled.

Plaintiff excepts.

By Judge LAUGHLIN: "I ask that this be marked Defendant's Exhibit "1", and would ask the interpreter to read it to the jury."

The report is read to the jury, and is as follows:

"DEFENDANT'S EXHIBIT 1."

T. D. 15.

"C."

Santa Fe Central Railway Company.

Personal Injury Report.

Instructions.—This form to be used by all persons required to make report of personal injuries, and forwarded to head of department. Where two or more persons are injured by the same accident, one of these blanks should be filled up for each person so injured. A written statement should be obtained also from each of the eye witnesses, if possible, and forwarded with report. One statement is sufficient from each eye witness, even where several persons
193 are injured at the same time. The head of department will investigate each case, see that all the required information is given, and forward reports to the superintendent. In case death results, a copy of verdict of coroner's jury must be procured, if an inquest is held.

Time of Accident, About 5:10 P. M. Date, Dec. 1st, 1906. Place M. P. 33. Full Name of person injured, Harry S. Friday. Residence: (P. O. Address, street and number) Santa Fe, N. M. Age 21. Nationality, American. Occupation, Brakeman; Married or Single, Single. Name and P. O. Address of nearest relative, John H. Friday, Steele City, Neb. Employé, passenger, traveler on highway, or trespasser, Employé.

If employé, how long in service of this company? 8 months.

How many years' railroad experience? 8 months.

Train No. 2. Engine No. C. R. I. & P. 493. Engineman, Wolverton, Fireman, Pino, Conductor or Foreman, E. E. Friday.

Brakeman or Switchman, Brakeman.

Watchman or crossing gates? ——.

Was engine bell rung, and by whom? ——.

What distance from accident was whistle alarm sounded? ——.

What other warning was given? ——.

Anything to obstruct the view of trainmen or person injured? ——.

Speed per hour at time of accident? 20 miles.
If backing up, who was on rear end? ——.
What precautions were taken, and by whom, to prevent the accident? ——.
Cause of accident: (give full particulars) Brakeman H. S. Friday was applying brakes while descending Clark Hill. He was on the third car behind Eng. setting brake on S. F. C. 618, when just north of M. P. 33, brake wheel slipped off the top of brake staff throwing Brakeman Friday between the two cars S. F. C. 618 & 621 sustaining injuries stated below.
Nature and extent of injury. (If leg, arm, etc., state if right or left) Left arm badly crushed between elbow & wrist—Upper lip badly cut from right nostril across left cheek about 4 inches.
Name of Surgeon called. Drs. Massie & Diaz. When did he arrive? Shortly after arrival at S. Fe.
194 What was done for injured person? Left arm amputated about 3 inches below elbow.
State your location with reference to point of accident and what you were doing at the time? On the fifth car below Eng. applying brakes. Was there any defect in track, rolling stock, machinery, tools or other appliances that caused, or may have assisted to cause, the injury? (Give Car Nos. and Initials) Brake Staff on S. F. C. 618 only 15 inches long. No nut or key to prevent brake wheel from slipping off the top of staff.
If any defect, how long had it existed? Unknown.
To whom had it been reported, by whom and when? Cannot say in this particular case.
Did injured person know of defect? Unknown.
Witnesses to accident or persons who can give any information regarding it? M. R. Ratliffe R. H. Wolverton A. Pino, G. W. Bond, L. A. Barth.
Remarks: State fully any other information. ——.
(Signed) E. E. FRIDAY.
Occupation, Condr.

Dated, Santa Fe, Dec. 3d, 1906.
Address, Santa Fe."

E. N. PEDEN, called as a witness in behalf of the defendant, after being duly sworn, testified as follows:

Direct examination.

(Questions by Judge LAUGHLIN:)

Q. Mr. Peden, how long have you been engaged in railroad business?
A. About twenty years.
Q. In what different capacities?
A. Well, I have been braking, firing, hostler, running engines, locomotive engineer, machinist, gang foreman round house foreman, and master mechanic.

Q. State some of the different railroad companies for which you have worked?

A. Johnston & Stony Creek Lake Terminal, Union Pacific, Oregon Short Line; El Paso and Northeastern, Atchison, Topeka & Santa Fe, and the Santa Fe Central.

Q. What capacity are you employed in at the present time for the Santa Fe Central, the defendant company here?

195 A. Master Mechanic.

Q. Mr. Peden, examine this brakestaff, and state whether or not it is a safe brakestaff and proper in form as to length and make? (Witness shown brakestaff offered in evidence by plaintiff.)

Plaintiff objects.
Objection overruled.
Plaintiff excepts.

A. This brakestaff is of sufficient length for the purpose it was used and is of as good a make as any brakestaff on any cars today. It also has the required thickness. There is no given length that I know of which brakestaffs are required to have. I have seen, and there is today, shorter brakestaffs than that on cars.

Q. Now, what defect, if any, is there about that brakestaff?

A. By the look of it, when the brakewheel was put on, this was riveted over (pointing to top of brakestaff), it shows there that it had been riveted at one time, and if it had been riveted properly it would have been just as safe as if it had been keyed or put on with a nut.

Q. Mr. Peden, is there any standard length of brakestaffs that you know of?

A. No sir.

Q. State the different lengths of brakestaffs so far as you know, at the present time in use?

A. Well, there are brakestaffs used at the present time that are not over twelve inches long.

Q. Twelve inches long, where is that measured from?

A. Well, that is measured, some from the brakewheel, and some from the end of the staff.

Q. Mr. Peden, you say you have been a locomotive engineer?

A. Yes sir.

Q. How long were you locomotive engineer?

A. Four years.

Q. Are you acquainted with the grade of Clark Hill on the Santa Fe Central, the place where this accident happened?

A. Yes sir.

Q. Are you acquainted with the engine that was used with the train that night of the accident?

A. No sir.

196 Q. You do not know what engine it was?

A. No sir.

Cross-examination.

(Questions by Mr. PRICHARD:)

Q. If it is true, Mr. Peden, that this brakestaff was used on a rack car on train No. 2, consisting of seven cars, among which was a passenger coach and four cars loaded with sheep, a train in which two cars had absolutely no air whatever, two other cars where the air would not work——

By Judge LAUGHLIN: "If the court please, no such testimony as that——

Q. (continued). —two other cars in which the air would not work, that is, the brakes would set but the air would leak and allow the brakes to release as train was coming down the hill, and there were no air brakes on the engine, but there were other brakes on the engine, and 50 per cent. at least of the power was lost to the train by reason of defective air, do you as a railroad man and as a Master Mechanic of the Santa Fe Central Railway, say that this staff was of sufficient length for the purpose for which it was used, if it was used, and the only handbrake used with nothing upon the top of this to hold on the brakewheel, no threads, or no screws by which to hold the brakewheel, do you as a railroad man say that was sufficient and safe for the purpose for which it was used at that time?

Defendant objects because the same is improper cross-examination, and second because the question is assuming facts which do not appear in the direct examination.

Objection overruled.

Defendant excepts.

Q. What other brake was on the engine?

A. I think that was perfectly safe as there is no call for brakes.

Q. Do you say as a witness, of your own knowledge, that there was no call for hand brakes on that train?

A. I say that that staff was perfectly safe under the conditions that I have understood the train was in.

Q. Do you understand from the conditions that the train was in that the hand brake was unnecessary to be applied at that time?

A. Yes sir.

197 Q. Were you there at the time the train came down Clark Hill?

A. No sir.

Q. Do you know how many cars were in that train?

A. Just as you stated, seven.

Q. You do not know then what cars were in the train, or the number of cars except as has been stated to you by myself at this time?

A. No sir.

Q. Now, do you say with the lack of air which has been called to your attention on that train, that the application of a hand brake coming down that grade which was from three to 3 4-10 degrees, do you say that a hand brake was unnecessary in coming down that hill under those circumstances?

A. Yes sir.
Q. Now, that is your knowledge of railroading?
A. Yes sir.
Q. How long have you been Master Mechanic down there?
A. One year the 27th of last August.
Q. Do you say as a Master Mechanic and as a railroad man, that there is no defect in that hand brake or brakestaff?
A. Well, I cannot say that there was not any defect at the time.
Q. If this brakestaff was at that time in the same condition that it is in now, at the end no thread around the top, and no nut on to hold down the wheeel, do you say that that was not defective under those circumstances?
A. Well, that all depends on what kind of a wheel would fit over it, whether it was tight or not.
Q. Well, if the wheel fitted over it and the wheel came off of it when the wheel was used, do you say that that was defective or not?
A. If the brakewheel was of the same taper as this staff shows, and the top of this riveted that it shows now, it would take a severe jerk to fetch that wheel over the top.
Q. Well, suppose now the brakewheel rested over this brakestaff and it was not riveted at the top, and the brakewheel came off when the brakeman applied the hand brake, would you consider that safe?
A. I would not if it was——

198 Witness excused.

The court here adjourned until 9:00 A. M. September 19, 1908.

Pursuant to adjournment the court met at 9:00 A. M. on September 19, 1908.
Present, as of yesterday.

S. B. GRIMSHAW, called as a witness in behalf of defendant, being duly sworn, testified as follows:

Direct examination.

(Questions by Judge LAUGHLIN):

Q. Mr. Grimshaw, when did you become Assistant to the President and General Manager of the Santa Fe Central Railway Company?
A. September 1, 1904.
Q. And continued as General Manager up to what time?
A. July 6, 1908.
Q. Mr. Grimshaw, was there ever any order or authority given brakemen while you were General Manager, to use clubs in their brakes?

Plaintiff objects, as it is immaterial whether there was any order given or not. The rules show that they applied brakes, and whether they applied those brakes in a careful manner with the facilities furnished, is simply a question for the jury, and it is wholly imma-

terial as to whether there were any orders as to how they should apply those brakes or not.

Objection overruled.

Plaintiff excepts.

A. No sir.

Q. Was there any instructions against them using clubs in the brakes?

Plaintiff objects as to what the instructions were as to brakes; if he wants to ask this witness a question whether this particular brakeman was instructed to use clubs or not——

Objection sustained.

Defendant excepts.

"The court will permit the defendant to show that this
199 particular brakeman was so instructed; for others, it is immaterial."

Q. Mr. Grimshaw, I will ask you to examine this circular and state whether or not the same was served as a part of the instructions? (Handing witness paper.)

A. Yes sir.

Q. State if you know whom that was served, or to whom copies of this were furnished?

Plaintiff objects, it is immaterial upon whom these copies were served.

By the COURT: "Yes, I think that ought to be shown in connection with this man in his capacity as an employe of the company. Objection will be sustained."

Defendant excepts.

Defendant offers paper for identification and asks that it be marked Defendant's Exhibit "8-A."

Q. Mr. Grimshaw, I will ask you to examine these papers handed you, (handing witness papers) state whether or not those dispatches were sent by you and received by you?

A. Yes sir.

Q. By whom is this last dispatch signed?

A. Signed A. C. P.

Q. What name was that intended to stand for?

A. A. C. Padley.

Q. What official position, if any, with the defendant company, did Padley hold at that time?

A. Clerk to the Master Mechanic.

Q. Who was Master Mechanic at that time?

A. I am not positive, but at this time I think, if I remember rightly, there was no Master Mechanic except himself.

Q. Who was the last Master Mechanic to this date?

A. Mr. Frank Zink.

Q. When did he leave the employment of the company as Master Mechanic?

A. I cannot remember the date when he left, but I think it was somewhere near this time, if I remember right.

Q. Is there any way by which you can determine when Frank Zink quit the service of the company?

A. Yes sir.

Plaintiff submits that it is immaterial when he quit the
200 service, or whether he ever quit the service of this railroad company, and therefore objects as it is immaterial.

Objection overruled.

Plaintiff excepts.

Q. I will show you another paper, Mr. Grimshaw, which may enable you to refresh your memory. Examine this paper? (Handing witness paper.)

A. I could not say positively when Mr. Zink left the service; I could find out in about five minutes at the Santa Fe Central office, I think it was possibly the date of this telegram, December 2nd and December 5th.

Q. I will show you another paper, Mr. Grimshaw, and ask you whether that was one of your orders. (Handing witness paper.)

A. Yes sir.

Q. That was an order issued by you?

A. Yes sir.

Defendant here offers this paper in evidence, which is dated Santa Fe, N. M. June 4, 1906, and is addressed to all train and engine crews, signed S. G. Grimshaw, Assistant to President and General Manager, and ask that the same be marked Exhibit "10."

Plaintiff objects to the introduction of this paper because it has not been connected with the plaintiff here, or shown that he had any knowledge who received any paper of that sort, in the first place, and in the next place, it could not be binding upon this plaintiff, and could only be binding upon the engineer and conductor, and has no bearing in this case, is immaterial, irrelevant and no part of the res gestæ.

By the COURT: "Is this your signature, Mr. Grimshaw, it gives "S. G. G."?

A. I presume the initial "G" is a clerical error.

Q. Did you issue that order?

A. I did, yes sir.

Objection overruled.

Plaintiff excepts.

By Judge LAUGHLIN:

Q. Mr. Grimshaw, what is the purpose of those names there? (Indicating names at bottom of letter.)

A. That is a notation made by the chief clerk of the names of the empolyés to whom the order or circular was mailed.

201 Defendant asks that the interpreter read paper to jury.

Interpreter reads paper to jury.

Q. Mr. Grimshaw, I will ask you to examine letter dated Santa Fe, May 7, 1906, signed S. B. Grimshaw, Asst. to Prest. & Gen. Mgr. to F. H. McBride; also letter dated Santa Fe, New Mexico, May 19, 1906; this one is addressed also to F. H. McBride, Agent, Santa Fe, New Mexico, and signed by S. B. Grimshaw, Asst. to Prest. & Gen. Mgr. and will ask if those are your signatures?

A. Yes, these letters were issued by my order.

Defendant here offers letter dated Santa Fe, N. M. May 7, 1906, as defendant's Exhibit "11"; and letter dated Santa Fe, N. M. May 19, 1906, as defendant's Exhibit "12."

Plaintiff objects to the introduction of these letters because they are irrelevant, immaterial and form no part of the res gestæ of this case, and are in no way binding upon this plaintiff, and because the employment of the plaintiff by the Santa Fe Central Railway is both proved and admitted.

Objection overruled.

Plaintiff excepts.

Q. Mr. Grimshaw, do you know whether or not Agent McBride made the examination required in that letter, of the plaintiff?

A. Yes sir, my recollection is that he was either examined by Mr. McBride, or by Mr. E. E. Friday.

Q. Do you know whether or not the examination, if made, was in writing, any report of it filed or not?

A. I do not think any written examination was given but after the examination was given a regular commission was issued to Brakeman H. S. Friday, I am quite sure of that.

Q. Mr. Grimshaw, state whether or not any care was provided for Mr. H. S. Friday when he was injured on the evening of December 1, 1906, by the defendant company?

By Mr. PRICHARD: "Now, it is immaterial whether there was any care provided or not by the company. I apprehend if the gentleman desires to show that the company was put to some actual expense on account of this plaintiff, that that can be introduced for the purpose of diminishing the damages to that extent, but on the proposition of whether there was care or not, that is wholly immaterial."

202 Objection overruled.

Plaintiff excepts.

Q. Mr. Grimshaw, state whether or not the defendant company had any physicians in its employ for giving attention to its employés in case they should become injured, or it should become necessary that they should have medical or surgical assistance?

A. Yes sir.

Q. State who the physician or physicians were at that time?

A. Dr. J. L. Norris, located at Estancia, New Mexico, was the chief surgeon; Dr. J. M. Diaz of Santa Fe was the assistant surgeon.

Q. State what you did, if anything, with reference to taking care of the plaintiff and furnishing medical and surgical assistance to him at the time he sustained this injury and during this illness?

By Mr. PRICHARD: "I object, that has nothing in the world to do with the question of the negligence of this company, nor does it have anything to do with the question in this case."

Objection overruled, with the understanding that this simply relates to the question of the physician's bill.

Plaintiff excepts.

A. I telephoned Dr. Diaz immediately and told him to procure a bus or a carriage, surgical instruments and bandages, and meet the train at the depot and do everything possible to remove Mr. Friday to the Sanitarium. I also went down there myself.

Q. Mr. Grimshaw, state whether or not Dr. Diaz or Dr. Norris or both of them, attended the plaintiff during his illness from this injury?

A. My remembrance is that Dr. Diaz attended regularly and Dr. Norris as often as he possibly could, and I think Dr. Massie too, I knew that he was attending him too.

Q. State who employed Dr. Massie, if you know, to treat the plaintiff at the time stated?

A. Mr. E. E. Friday.

Q. State how Doctors Diaz and Norris were paid, if their services were paid at all, or who paid them?

Plaintiff objects, it is immaterial.

Objection overruled.

Plaintiff excepts.

203 A. Dr. Norris received one dollar per month from the salary of each man employed, it being understood that Dr. Norris was to furnish medicines and the care of all persons and employés injured, and with that an annual pass over the road. Dr. Diaz was employed under the supervision of Dr. Norris, and I do not know what his compensation was.

Q. He was employed, I presume, then by Dr. Norris and paid by Dr. Norris, if paid at all.

A. Yes sir.

Q. Mr. Grimshaw, please examine the papers I hand you and state whether you ever saw those papers, and if so, about when?

A. Yes sir.

Defendant here offers in evidence a letter dated December 30, 1906, addressed to S. B. Grimshaw, General Manager, Santa Fe, N. M. signed W. H. Andrews, President and General Manager; also a letter, dated Interstate Commerce Commission, Office of Secretary, Washington, April 27, 1906, addressed to W. H. Andrews, Esq., President and General Manager, Santa Fe Central Railway company, signed by E. A. Moseley, Secretary; also a paper, Report of Inspector, for the Interstate Commerce Commission. Station: Estancia, New Mexico, April 2, 1906, that part of it only referring to Car 618.

By Mr. PRICHARD: "I shall ask that the whole report be introduced. I insist that the whole report go in. I ask that the whole thing go before the jury. I object."

Objection overruled.

Plaintiff excepts.

Said letters and report marked Exhibits "13," "14," and Exhibit "15" that part of which relates to car 618.

The interpreter read said exhibits to the jury.

Q. Mr. Grimshaw, did you know of this car inspector being here and examining the railroad machinery and appliances, the man who made this report?

A. Yes sir.

Q. Do you know what his name was?

A. No sir, I do not.

Q. He was the government inspector?

A. He was said to be the government inspector.

Q. He so represented himself?

A. I believe so.

Q. Did you see him?

204 A. No sir.

Q. State whether or not you took any steps with reference to these defects reported on, with respect to the machinery and appliances on car 618.

Plaintiff objects. It is wholly immaterial.

Objection overruled.

Plaintiff excepts.

A. Yes sir.

Q. What did you do, Mr. Grimshaw?

A. Sent a copy of the report with instructions to the Master Mechanic at Estancia, to commence at once and make the necessary repairs, and then to report each car when it was repaired so I could notify the Interstate Commerce people that the car or cars had been repaired.

Q. Do you remember about when you made an effort to repair these defects on car 618?

A. No sir, I cannot remember that, but the records of the company in the general office here will show the report of the Master Mechanic at Estancia, New Mexico, to me, giving the initial and number of the car and the repairs made. The records will also show that information transmitted to the Interstate Commerce Commission at Washington.

Q. Do you remember whether that was before or after December 1, 1906?

A. No sir, I cannot remember that, because the Master Mechanic was reporting now and then at different times; it would be very difficult for me to fix a date, I could not do it.

Q. Mr. Grimshaw, state whether or not you ever gave any instructions to your employés with reference to complying with the requirements of the Interstate Commerce Act, and the Safety Appliance Act of Congress?

Plaintiff objects; it is immaterial whether he gave instructions or not; the question is whether the car is defective or out of order.

Objection overruled.

Plaintiff excepts.

A. I am under the impression that I issued a circular.

By Mr. PRICHARD: "I ask that that be stricken out, 'I am under the impression,' on the ground that it is simply his impression, not his knowledge."

By the COURT: "The answer will be stricken out."

205 Cross-examination.

(Questions by Mr. PRICHARD:)

Q. Mr. Grimshaw, recurring to your letter of June 4, 1906, I notice the following language: "before descending Clark Hill north bound must in each and every case have the air properly tested and know it is in good working order before dropping down the hill," was it expected that brakemen under that order should make the necessary repairs to machinery, or was it the duty of the Master Mechanic?

A. It was the duty of the Master Mechanic.

Q. Were there any facilities on top of Clark Hill for making any repairs of defective air brakes, or having the air in proper condition?

A. No sir, only those that were with the train.

Q. Who had control of the train there, was it the conductor or the brakeman.

A. The conductor.

Q. The brakeman was acting under the order of the conductor, was he?

A. Yes sir.

Q. And he had nothing to do with the repairing of the machinery which should have been repaired at the shops of the Master Mechanic?

A. No sir.

Q. Mr. Grimshaw, I see several names placed at the bottom of this letter of June 4, 1906, in writing, the first is Friday, the next is De Mier, Carlisle, Robb, Marshall, Fisher; who is this man Friday referred to?

A. Conductor E. E. Friday.

Q. Then it was not the brakeman Harry S. Friday?

A. No sir.

Q. Recurring to your letter of May 7, 1906, to Mr. F. H. McBride, Agent at Santa Fe, I find the following language: "Conductor Friday was speaking to me about the employment of his brother as a brakeman and advised that he would if satisfactory, take him out on the road and break him in before he started to work;" do you know whether Conductor Friday did take the boy out on the road to break him in before he statrted to work?

A. Yes sir, he did.

206 Q. How long was he breaking him in before he started to work.

A. I could not say positively, but fifteen or twenty days, or it might be longer.

Q. Now, I also find this language in that letter of May 7, 1906:

"Also advise him to study up on the rules so that he can take an examination. Have him prepare regular application and take the physical examination before Dr. Norris." Now, do you know whether he did study up on the rules or not?

A. Yes sir, I am satisfied he did or he could not have passed the examination; I would not have employed him if he had not passed his examination.

Q. And did he pass the physical examination?

A. I cannot say positive as to that, but the men were being examined all the time, and my chief clerk had instructions to see that every man passed an examination.

Q. But you do know that a commission was issued to him, a service commission as brakeman?

A. Yes sir, I say without a doubt.

Q. Will you look at this paper I hand you and state whether that is the service commission to which you refer? (Handing witness paper.)

A. Yes sir.

Q. Whose signature is that?

A. It is S. B. Grimshaw, per S. A. F. H. McBride.

Plaintiff here offers this paper in evidence.

Defendant objects to the offer of this paper until plaintiff comes to his side of the case.

Objection overruled.

Defendant excepts.

Plaintiff here presents the commission referred to and asks that same be marked Exhibit "I" for identification.

Q. I also see letter of yours, Mr. Grimshaw, dated May 19, 1906, addressed to Mr. F. H. McBride, Agent, Santa Fe, in which there is the following language: "As soon as you can get to it, kindly arrange to have Mr. H. S. Friday examined on train rules, air, etc." Do you know whether that examination was had?

A. Yes sir.

Q. Do you know who gave him the examination, Mr. Grimshaw?

A. F. H. McBride.

207 Q. Was this prior to the issuing of your commission?

A. Yes sir.

Q. You speak of having a physician in your employ, or rather in the employ of the Santa Fe Central Railway company, whose name was Dr. Norris, and that he was paid as his salary a dollar per month from each employé of the company, is that correct?

A. Yes sir.

Q. Now, did Mr. Harry S. Friday, one of the employés of the company, contribute his dollar a month for that purpose while he was in your employ?

A. He certainly did.

Q. To whom did you say you sent this report of the Interstate Commerce Commission, for the purpose of making repairs?

A. If I remember rightly it was Mr. Frank Zink, the Master Mechanic.

Q. State, Mr. Grimshaw, whether that was before you sent to Mr. Joe Harris the following telegram: "Train 2 December 1st, cars 618 and 621 passed Estancia with defective brakestaff and wheels; why did you allow this? answer." Now, what I want to know is if that report was sent to him before you sent this telegram?

A. I think it was.

Q. Was it sent to him before you received the following from Joe Harris, Dated December 5, 1906; "All the rack cars in Train 2 on December 1st, had defective brakestaffs, in that they had been cut off from 12 to 15 inches below standard height and the wheel end left with a square head and no place for a nut as per standard. The other cars in this train were O. K." Was this report sent to Mr. Zink before you received this paper from Joseph Harris, Car Repairer and Inspector?

A. Yes, I think so.

Witness excused for the present.

By Judge LAUGHLIN: "If the court please, we will offer an alleged report of the accident, dated December 5, 1906, and signed by the plaintiff, which was offered for identification as Defendant's Exhibit "2," and now offered in evidence."

"I also offer application for employment signed by plaintiff H. S. Friday, dated May 5, 1906."

208 By Mr. PRICHARD: "I object to this because it is wholly immaterial; there is no purpose which it can serve; it is admitted that he was employed, both asserted by himself and admitted by the defendant company that he was employed as a brakeman; he has his commission as brakeman; therefore it is wholly immaterial."

The jury was withdrawn and argument made by counsel.

Jury recalled.

Objection overruled, and paper admitted for what it is worth.

Plaintiff excepts.

Paper admitted and marked Defendant's Exhibit "3."

Defendant now offers in evidence the Surgeon's Certificate and the application blank filled out and signed by H. S. Friday, the plaintiff and identified, and marked for identification Defendant's Exhibit "4."

Defendant now offers in evidence report of the alleged accident, signed by R. H. Wolverton, Engineer, and marked Defendant's Exhibit "5."

Plaintiff objects to this offer; it is a declaration of Wolverton outside of the court.

Objection overruled.

Plaintiff excepts.

Defendant now offers report of the alleged accident, dated 12-1-06 and signed by A. Pino, Fireman, as Defendant's Exhibit "6."

Plaintiff objects.

Objection overruled.

Plaintiff excepts.

Defendant now offers rules on pages 88 and 89, Rule 703 in the

book of instructions, and Rule 704 on page 90, and 708 on page 94, marked Defendant's Exhibit "7-A."

Defendant now offers circular showing adoption of these rules which is dated Santa Fe, N. M., October 22, 1904, and signed
209 by S. B. Grimshaw, Assistant to President and General Manager, and marked Defendant's Exhibit "7."

Plaintiff objects.

Objection overruled.

Plaintiff excepts.

Defendant now offers report dated Estancia, 7-2-06, addressed to Mr. S. B. Grimshaw, Assistant to President and General Manager, Santa Fe, N. M., and signed Frank Zink, Supt. M. P. & R. S. and asks that it be admitted *to* evidence, and marked Exhibit "16."

By Mr. PRICHARD: "I object, your honor, here is a letter that is dated some months prior to this alleged injury. It has no reference whatever to the points in reference to this case. I know of no law under which it can be admitted.

By the COURT: "The court will hold that this is a report of a person who is competent to make a report as to car 618."

Objection overruled.

Plaintiff expects.

The court here adjourned until 2:00 P. M.

Pursuant to adjournment the court met at 2:00 P. M.
Same parties present.

Dr. J. M. DIAZ, called as a witness in behalf of the defendant, after being duly sworn, testified as follows:

Direct examination.

(Questions by Judge LAUGHLIN:)

Q. Dr. Diaz, what is your profession?

A. I am a surgeon and physician.

Q. How long have you been practicing surgery and medicine?

A. Sixteen years.

Q. Have you been continuously engaged in the practice of medicine and surgery?

A. Yes sir.

210 Q. If you are a graduate of any medical schools or colleges, please so state?

A. Monterey, Mexico, Medical School.

Q. Have you attended any colleges in the United States?

A. Yes sir. Polyclinic of New York.

Q. You are a licensed physician and surgeon in this Territory, are you?

A. Yes sir.

Q. State whether or not you had any professional relations with the Santa Fe Central Railway company about the first day of December, 1906?

A. At that time I was employed by Dr. Norris to attend the Santa Fe Central sick people in Santa Fe.

Q. Did you ever see this young gentleman, Mr. Harry S. Friday, at that time?

A. Yes sir.

Q. State the circumstances under which you saw him, Dr. Dias?

A. At the time Mr. Friday had been injured in the railway accident, he had some lacerations upon the face, also fractures of the left arm.

Q. State whether or not you attended Mr. Friday professionally for these injuries?

A. In some way I did. If I remember correctly when I was notified to that effect, I went to the depot and assisted the young man to come to the Sisters' Sanitarium.

Q. At whose request did you meet the plaintiff, Mr. Friday, at that time?

A. I do not remember exactly, but my duty was then, as surgeon for the Santa Fe Central, to take care of the sick.

Q. And it was then in your line of duty as an employé of the Santa Fe Central that you went to the depot and took him to the sanitarium?

A. I met him at the depot and went with him to the
211 Sanitarium, and at the request of the family, Dr. Massie was called in and I assisted him doing the work and afterwards.

Q. State whether or not you treated Mr. Friday while he remained in the Sanitarium suffering from these injuries?

A. Not as head physician.

Q. Who was the head physician?

A. Dr. Massie.

Q. And who were you working under?

A. Dr. Norris, Chief Surgeon of the Santa Fe Central at that time.

Q. You treated Mr. Friday, did you, while he remained in the sanitarium?

A. Well, as I stated not as head physician but assistant to Dr. Norris.

Q. But you did give him attention?

A. Yes sir.

Q. About how often were you there?

A. I do not remember exactly, but it seems to me that I visited him daily.

Q. You say Dr. Massie was called in at the request of the family?

A. Yes sir.

Q. As the family of Mr. Friday?

A. Yes sir.

Plaintiff moves to strike out all that testimony as not coming within the purview of the statute; no sum of money shown to have been paid by the defendant company.

Motion overruled.

Plaintiff excepts.

By Mr. PRICHARD: "I would like to have the records show that there is an objection to the admission of all these reports, and the letter of Mr. Zink."

212 S. B. GRIMSHAW recalled to the stand by the defendant.

(Questions by Judge LAUGHLIN:)

Q. Mr. Grimshaw, examine this book and state what it is. (Witness handed book which he examines.)

A. It is a letter book in which the letters of the Santa Fe Central Railway company were copied.

Q. Mr. Grimshaw, state the address on page 127 of that book, and the signature:

A. The address is Mr. Edward A. Moseley, Secretary Interstate Commerce Commission, Washington, D. C. Signed S. B. Grimshaw, Assistant to President and General Manager.

Q. Mr. Grimshaw, examine the date of that letter and state whether it is a correct date or not.

Plaintiff objects.

A. No sir, I think not.

Q. What is the date that letter was written, if you know, and signed by you?

A. July 5, 1906.

Q. Have you the original letter?

A. No sir.

Defendant here offers that letter press copy in evidence and asks that it be marked Exhibit "17."

Plaintiff objects as it is not the original letter.

Q. What became of the original letter, Mr. Grimshaw?

A. Mailed to Mr. Moseley.

Q. To the party to whom it was addressed?

A. Yes sir.

Q. And what is that letter; is that letter a letter-press copy?

A. Yes sir.

Defendant here offers that letter press copy in evidence.

Plaintiff objects.

213 Let the record show that the attorney for plaintiff objects on the grounds that it is a self-serving declaration by the company, and is immaterial and irrelevant.

Objection overruled as to such portion of the letter as relates to Car 618.

Plaintiff excepts.

PLAINTIFF'S EXHIBIT "F."

TERRITORY OF NEW MEXICO,
County of Santa Fe:

Affidavit.

Harry Slocum Friday, being first duly sworn states that he is a claimant against the Santa Fe Central Railway Company, a corporation and a common carrier doing business in the Territory of New Mexico, for damages on the account of personal injuries received by him.

Affiant, whose postoffice address is Santa Fe, New Mexico, says: That on the first day of December, 1906, while he was an employé of said railway company and in the actual discharge of his duties as brakeman on a mixed train between the stations of William's Spur and Clark, on said railway, in said territory, he had his left arm broken and crushed below the elbow, necessitating amputation thereof, and his upper lip cut and lacerated from the right nostril extending about four inches across the left cheek. That the circumstances under which said injuries were received are substantially as follows: Affiant while in the act of applying the brakes descending Clark Hill to the north between the points above mentioned, on the third car behind the engine of said train when just north of mile post 33, the brakewheel which he had in his hands at
214 the time slipped off the top of the brakestaff, throwing affiant between the two cars, S. F. C. Nos. 618 and 621, sustaining injuries as above stated.

The witnesses to the happening of the facts above mentioned causing said injuries, and other facts connected therewith are as follows: E. E. Friday, Santa Fe, New Mexico; M. R. Ratliffe, Torrance, New Mexico; G. W. Bond, Trinidad, Colorado; L. H. Barth, postoffice address unknown; R. H. Wolverton, Santa Fe, New Mexico, and A. Pino, Santa Fe, New Mexico. Further affiant said not.

HARRY SLOCUM FRIDAY.

Subscribed and sworn to before me this 2nd day of Feb., 1907.

[SEAL.] RICHARD H. HANNA,
Notary Public.

My commission expires May 31, 1908.

DEFENDANT'S EXHIBIT "2."

T. D. 15.

"Santa Fe Central Railway Company.

Personal Injury Report.

Instructions.—This form to be used by all persons required to make report of personal injuries, and forwarded to head of depart-

ment. Where two or more persons are injured by the same accident, one of these blanks should be filled up for each person so injured. A written statement should be obtained from each of the eye witnesses, if possible, and forwarded with report. One statement is sufficient from each eye witness, even where several persons are injured at the same time. The head of department will investigate each case, see that all the required information is given, and forward reports to the superintendent. In case death results, a
215 copy of verdict of coroner's jury must be procured, if an inquest is held.

Time of Accident, About 5:10 P. M. Date, Dec. 1st, 1906. Place, About M. P. 33.

Full name of person injured, Harry S. Friday.

Residence: (P. O. Address, street and number) 223 Garfield Ave. Santa Fe, N. M.

Age, 21. Nationality, American. Occupation, Brakeman. Married or single, Single.

Name and P. O. Address of nearest relative, E. E. Friday, Santa Fe, N. M.

Employé, Passenger, traveler on highway, or trespasser, Employe.

If employé, how long in the service of this company? 8 mo.

How many years' railroad experience? 8 mo.

Train No. 2. Engine No. 493; Engineman Wolverton. Fireman, Pino.

Conductor or Foreman, E. E. Friday.

Brakeman or Switchman, Brakeman.

Watchman or crossing gates? No.

Was engine bell rung, and by whom? No.

What distance from accident was whistle alarm sounded? —.

What other warning was given? —.

Anything to obstruct the view of trainmen or person injured? —.

Speed per hour at time of accident, 25 miles.

If backing up, who was on rear end? —.

What precautions were taken, and by whom, to prevent the accident? —.

Cause of accident; (give full particulars) Started to set brakes on 618 when brake wheel slipped off throwing me in between cars and causing loss of left arm and cutting face for about 3½ in. on left side near nose and on cheek

Nature and extent of injury. (If leg, arm, etc., state if
216 right or left.) Left arm badly mangled and broken and face terribly mutilated.

Name of surgeon called? Diaz and Massie. When did he arrive? On arrival of No. 2 at Santa Fe.

What was done for injured person? Taken to St. Vincent Sanitarium.

State your location with reference to point of accident and what you were doing at the time? Was on S. C. 618, 3d car behind Eng. setting brakes.

Was there any defect in track, rolling stock, machinery, tools or

other appliances that caused or may have assisted to cause the injury? (Give Car Nos. and Initials.) Brake staff on S. C. car 618 was only 15 inches high from top of ratchet wheel to top of brake wheel. No nut or key to prevent wheel from coming off staff.

If any defect, how long had it existed? Don't know.

To whom had it been reported, by whom and when? Can't say in this particular.

Did injured person know of defect? All S. F. C. rack cars in B. O.

Witnesses to accident or persons who can give any information regarding it?

M. R. Ratliff, E. E. Friday, R. H. Wolverton.

Remarks: State fully any other information?

(Signed) H. S. FRIDAY.

Occupation, Brakeman.

Address, Santa Fe, N. M."

Dated, —— —, 190-.

DEFENDANT'S EXHIBIT "3."

T. D. 1.

Santa Fe Central Railway Company.

Application for Employment.

To S. B. Grimshaw, Superintendent Asst. to Pres. & G. M.

SANTA FE, N. M., *May* 5, 1906.

217 DEAR SIR: I hereby apply for a situation as Brakeman or in such other service or employment as may be necessary or required from time to time by the Company, and if accepted agree to observe all the rules and regulations, abstain from the use of intoxicating liquors, conduct myself properly, whether on or off duty, and to perform my duties to the best of my ability; and in the event of my leaving the service for any cause, I hereby authorize the Company and its officers to answer any and all inquiries as to my conduct and qualifications while in such service, and, so far as they know, the cause of my leaving the same.

Name in full (no initials) Harry S. Friday.

Age, 21. Born at Steele City; County Jefferson; State, Nebraska.

Present address: Santa Fe. Married or Single: Single.

Names and Address of Parents: J. H. Friday, Steele City, Nebraska.

Residence of wife: —.

Name and degree of nearest relative, if parents are dead —.

Address of nearest relative: —.

No. years' railroad experience: None.

Following is my record for Five Years previous to date of application.

Name of Railroad or other Employer. —.
Station or Division —.
Occupation —.
Date Entered Service —.
Date left Service —.
Address of Superior Officer or Employer —.
Cause of Leaving (If not room here use other side) —.
Employed on farm since Jan. 1, 1906.
In school prior to this time.

HARRY S. FRIDAY, *Applicant.*

—— ——, *Witness.*

218 NOTE.—This blank must be filled up by every applicant for employment in the Company's service (except ordinary laborers). Heads of Departments will take impression copy of same and forward original to the Superintendent's office.

DEFENDANT'S EXHIBIT "4."

Form T. D. 46—N. M. P. 2-05.

The Santa Fe Central Railway Company.

Surgeon's Certificate.

To be filled out and signed after a Personal examination by any of the Company's Surgeons, at any of the Division points.

Name, Harry S. Friday. Residence, Santa Fe, N. M. Age 21.
Complexion, Light. Color of hair, Brown. Color of eyes, Brown.
Special marks on face or hands, Scar on left side of upper lip.
Occupation, Farmer. Height 5 feet 8 in., weight 146½.
Nationality, American. Married or single, Single.

1. Has the applicant ever had severe headache, vertigo, fits or any nervous trouble? No.
2. Has the applicant any defects of arms, hands, legs or feet? No.
3. Is the applicant ruptured? No.
4. Has the applicant had smallpox or been recently vaccinated (vaccination compulsory). No, but willing to be vaccinated.
5. Has the applicant varicose veins? No.
6. Has the applicant hemorrhoids or fistula? No.

219 7. Is the respiratory murmur clear and distinct in every part of both lungs? Yes. Forced inspiration, Yes. Forced expiration, Yes.

8. Is there any indication of disease of the heart or blood vessels? No.
9. Urinary analysis made in all cases: Color, clear amber. Specific gravity 1024. Albumen, No. Sugar, No.
10. Has the applicant ever had any severe illness, or injury, or undergone any surgical operation? No.

11. Is there apparent in the applicant any predisposition, either hereditary or acquired, to any local or constitutional disease? No.

12. When placed at distance of twenty (20) feet from the types, the last five (5) letters read correctly by the applicant are:—Left eye, 20-20 good. Right eye, 20-20 good; both eyes 20-20 good.

13. Color sense, for red, good. For green, good.

14. The applicant hears the tick of a watch with the right ear at — inches, with the left ear at — inches. The applicant hears a whisper, right ear, — feet, left ear, — feet. Applicant hears ordinary conversation, lips or speaker turned away from applicant, right ear, — feet, left ear, — feet. Hearing good.

I hereby certify, that the answers given by me are correct and true.

HARRY S. FRIDAY, *Applicant.*

I hereby certify, that having examined the applicant I find him qualified to fill the position of brakeman.

Remarks: —. Disqualifying defects: —. Defects that do not disqualify —.

(Signed) JOHN L. NORRIS, *Surgeon.*

Dated May 12, 1906.

220 DEFENDANT'S EXHIBIT "5".

T. D. 15.

"Santa Fe Central Railway Company.

Personal Injury Report.

Instructions.—This form to be used by all persons required to make report of personal injuries and forwarded to head of department. Where two or more persons are injured by the same accident, one of these blanks should be filled up for each person so injured. A written statement should be obtained also from each of the eye witnesses, if possible, and forwarded with report. One statement is sufficient from each eye witness, even where several persons are injured at the same time. The head of department will investigate each case, see that all the required information is given, and forward reports to the department. In case death results, a copy of verdict of coroner's jury must be procured, if an inquest is held.

Time of accident, 5 10 P. M. Date 12 1 1906. Place, M. P. 32½.

Full name of person injured, Harry S. Friday.

Residence: (P. O. Address, street and number) Santa Fe.

Age, 21. Nationality, American. Occupation, Brakeman. Married or Single. Single.

Name and P. O. Address of nearest relative? Ed. Friday, Santa Fe.

Employé, manager, traveler on highway, or trespasser? Employé.

If employé, how long in service of this company? 4 months.

How many years' railroad experience? 4 months.
Train No. 2. Engine No. 493. Engineman, Wolverton? Fireman, Pino.
Conductor, Ed. Friday.
221 Brakeman, Harry Friday.
Watchman or crossing gates, No.
Was engine bell rung, and by whom? No.
What distance from accident was whistle alarm sounded? Not sounded.
What other warning was given? None.
Anything to obstruct the view of trainmen or person injured? —.
Speed per hour at time of accident? 12 miles. If backing up, who was on rear end? —.
What precautions were taken, and by whom, to prevent accident? Don't know.
Cause of accident: (Give full particulars). Brakeman fell off train, do not know cause.
Nature and extent of injury. (If leg, arm, etc., state if right or left) Left arm broken and face bruised.
Name of Surgeon called? J. M. Diaz. When did he arrive? 7:05 P. M.
What was done for injured person? He was put in coach and brought to Santa Fe.
State your location with reference to point of accident, and what you were doing at the time? Running engine.
Was there any defect in track, rolling stock, machinery, tools or other appliances that caused, or may have assisted to cause, the injury? (Give car Nos. and Initials.) S. F. C. 618 and 621. I did not notice cars before accident, but on examining cars after accident found it was defective.
If any defect, how long had it existed? Do you know.
To whom had it been reported, by whom and when? Do you know.
Did injured person know of defect? Do not know.
Witnesses to accident or persons who can give any information regarding it: Ed. Friday, R. H. Wolverton and A. Pino.
222 Remarks: State fully any other information: —.
(Signed) R. H. WOLVERTON.

Dated Dec. 3, 1906.
Occupation, Engineer.
Address, Santa Fe.

DEFENDANT'S EXHIBIT "6."

T. D. 15.

Santa Fe Central Railway Company.

Personal Injury Report.

Instructions.—This form to be used by all persons required to make report of personal injuries, and forwarded to heard of de-

partment. Where two or more persons are injured by the same accident, one of these blanks should be filled up for each person so injured. A written statement should be obtained also from each of the eye witnesses, if possible, and forwarded with report. One statement is sufficient from each eye witness, even where several persons are injured at the same time. The head of department will investigate each case, see that all required information is given, and forward reports to the superintendent. In case death results, a copy of the coroner's jury must be procured, if an inquest is held.

Time of accident, 5:10 P. M. Date, 12-1-1906. Place, Mile Post 32½.

Full name of person injured. Harry S. Friday.

Residence: (P. O. Address, street and number) Santa Fe, N. Mex.

Age 21. Nationality, American. Occupation Brakeman. Married or Single, Single.

Name and P. O. Address of nearest relative? Ed. Friday, Santa Fe, N. Mex.

Employé, passenger, traveler on highway, or trespasser? Employé.

223 If employé, how long in service of this company? 4 months.

How many years' railroad experience? 4 months.

Train No. 2. Engine No. 493. Engineman? R. H. Wolverton; Fireman, A. Pino. Conductor, Ed. Friday.

Brakeman, Harry S. Friday.

Watchman, or crossing gates? None.

Was engine bell rung, and by whom? No.

What distance from accident was whistle alarm sounded? Not sounded.

What other warning was given? None.

Anything to obstruct the view of trainmen or person injured? —.

Speed per hour at time of accident? 12 miles. If backing up, who was on rear end? —.

What precautions were taken, and by whom, to prevent accident? Do not know.

Cause of accident: (Give full particulars) Fell off train.

Nature and extent of injury. (If leg, arm, etc., state if right or left) Left arm run over and face bruised.

Name of surgeon called? Dr. J. M. Diaz. When did he arrive? 7:05 P. M.

What was done for injured person? —.

State your location with reference to point of accident, and what you were doing at the time? Firing engine.

Was there any defect in track, rolling stock, machinery, tools or other appliances, that caused, or may have assisted to cause, the injury? (Give Car Nos. and Initials) Do not know.

If any defect, how long had it existed? —.

To whom had it been reported, by whom and when? —.

Did injured person know of defect? —.

Witnesses to accident or persons who can give any information regarding it? R. H. Wolverton, Ed. Friday, M. R. Ratliff, A. Pino.

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Remarks: State fully any other information: —.

(Signed) A. PINO.

Dated 12-4-06.
Occupation, Fireman.
Address, Santa Fe, N. Mex.

DEFENDANT'S EXHIBIT "7-A."

"Rule 703, page 88, Book of Rules and Regulations for the Government of Employés of the Operating Department, 703. The passenger Conductor reports to the Train Master.

He must obey the orders of the Chief Division, Station Master, and Ticket Receivers, and conform to instructions issued by the Accounting Passenger and Treasury Departments.

He must report for duty at the appointed time with his trainmen; assist in making up his train when necessary; see that the engine and train are supplied with full sets of signals; and ascertain that the cars have been cleaned, inspected and properly equipped, and that the brakes and other appliances are in proper order.

He must have a reliable watch and a copy of the Time-table; examine the General Order board for each trip, and compare time with the enginemen before starting.

He must show his train orders to his Flag man.

The Conductor is responsible for the movement, safety and proper care of his train and for the vigilance and conduct of the men employed thereon; and must report any misconduct or neglect of duty.

It is his duty to ascertain that passengers are provided with tickets, collect fare from those who are not, and put off, at a convenient station, any who refuse to pay fare; attend courte-

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ously to the comfort and wants of passengers, and see that his Trainmen do the same; see that passengers are properly seated and not allow them to ride on the platforms, or in the baggage, express or mail cars, or violate, in any respect, the regulations provided for their safety; maintain good order; and not allow drunken or disorderly persons to get on the train."

Rule 704, page 90.

704. The Passenger Brakeman reports to the Train Master.

While on duty he is under the direction of the Conductor. At stations he must obey the orders of the Station Master or Yard Master.

It is his duty to attend to the brakes; take care of and properly display train signals; attend to the lighting, heating and ventilation of all cars; open and close the car doors; and assist the conductor in the proper disposition of the passengers, and in preventing them from riding on the platform or in any way violating the regulations provided for their safety; in preserving order, and in all

things requisite for the prompt and safe movement of the train and the comfort of the passengers.

He must report for duty at the appointed time; assist in making up his train, if necessary; give polite attention to the wants of the passengers, avoiding unnecessary conversation; and announce at each stopping place the name of the station and the length of the stop, if more than two minutes. When necessary to pass through sleeping cars, he must do so quietly, so as not to disturb the passengers.

The post of the rear Brakeman is on the last car of the train. He must go back to protect the train in cases where the rules require it, without waiting for signals or instructions to do so; if the train should part, the Brakeman must immediately stop the rear
226 portion and send forward the most reliable person he can secure to make stop signals until the front portion comes back, while he protects the rear."

708, page 94.

The Freight Brakeman reports to the Train Master.

He must obey the orders of the Yard Masters. When on duty he is under the direction of the Conductor.

It is his duty to attend to the brakes; be provided with, take care of and properly display train signals, assist the Conductor in loading or unloading the freight, in inspecting the cars, and doing all things necessary for the safe and prompt movement of the train.

He must examine and know that the brake shafts and attachments, ladders, running boards, hand holds and other parts and mechanical appliances which he is to use, are in proper condition; if not put them so, or report them to the proper parties and have them put in order before using.

DEFENDANT'S EXHIBIT "7."

Santa Fe Central Railway Company.

Office of Assistant to President and General Manager.

Order No. 7.

The book of the Chicago, Rock Island and Pacific Railway Company, containing rules and regulations for the government of employés of the operating department, effective August 1, 1904, is hereby adopted and will continue in force for the government of employés of The Santa Fe Central Railway Company, until further notice.

One book will be sent to each employé who will carefully study the same and be prepared for an examination by a regular
227 examiner, who will be appointed.

Mr. Martin Monroe is hereby appointed examiner. This examination will be commenced on November 15th, 1904, and each employé who passes the prescribed examination will be given a service commission.

Each employé will be required to sign for the book of rules and when leaving the service this book must be returned to the company.

S. B. GRIMSHAW,
Assistant to the President and General Manager.

Santa Fe, N. M., October 22, 1904."

DEFENDANT'S EXHIBIT "8–A"—BULLETIN.

Santa Fe Central Railway Company.

Office of Assistant to President and General Manager.

Order No. 25.

As previously advised all applicants to the Train-Master and the Superintendent of Motive Power and Rolling Stock for employment with the Santa Fe Central Railway Company must observe the following rules:

1. Service letters or recommendations must be given. These letters to be returned to the applicant after they have served our purpose.

2. The applicant must apply to Dr. J. L. Norris, Company Surgeon, with headquarters at Estancia, for physical examination, and must fill out the blank form T. D. 46, which will be provided by the company's surgeon and must pass his examination.

3. After the service letters have been procured and the applicant has passed satisfactory examination, such letters and the form will be transmitted to me by the Trainmaster and the Superin-
228 tendent of Motive Power and Rolling Stock, for my approval. After approval has been given, trainmaster will examine the applicant for train service, this meaning the conductors and brakemen, and if such examination be passed satisfactorily, the Trainmaster will issue our regular certificate commission, and will then forward all the papers with the application blank form T. D. 1 to this office for recording in our employment book. The Trainmaster will examine all engineers and firemen on the book of rules and regulations governing train service.

4. The Superintendent of Motive Power and Rolling Stock will examine all engineers and firemen as to their qualifications, etc., and be governed by the usual rules, sending the men to the Trainmaster for their final examination on the rules and regulations.

5. Minors will not be allowed in engine or train service. They may be employed at shops but not until the customary release has been executed.

* * * * * * *

Approved:

W. H. ANDREWS,
Pres. & Gen. Man.
S. B. GRIMSHAW,
As't to Pres't & Gen. Man.

Santa Fe, N. M., February 7, 1905.

(Signed) FRIDAY.
2-16-05.

DEFENDANT'S EXHIBIT "9."

Rule 105 (*Same Book of Rules and Regulations*) *Page* 37.

"Both conductors and enginemen are responsible for the safety of their trains, and, under conditions not provided for by the rules, must take every precaution for their protection.

"106. In all cases of doubt or uncertainty, the safe course must be taken and no risks run."

229 DEFENDANT'S EXHIBIT "10."

"Copy.

The Santa Fe Central Railway Company.

Office of Assistant to Pres't & Gen. Manager,

SANTA FE, N. M., *June* 4, 1906.

To All Train and Engine Crews:

A recent serious wreck on a foreign line caused by the failure of air has been brought to my attention. Please remember my former instructions that all trains and light engines before descending Clark Hill north bound must in each and every case have the air properly tested and know it is in good working order before dropping down the hill.

I want all engineers and trainmen to pay special attention to this air as carelessness in any degree may cause the loss of life and property.

Yours truly,
(Signed) S. B. GRIMSHAW,
Ass't to Pres't & Gen. Mgr.

Friday 6-9 06
De Mier 6 14-06
Carlisle,
Robb,
Marshall,
Fisher."

DEFENDANT'S EXHIBIT "11."

The Santa Fe Central Railway Company.

Office of Assistant to President and General Manager, S. B. Grimshaw.

SANTA FE, N. M., *May* 7, 1906.

Mr. F. H. McBride, Agent, Santa Fe, N. M.

DEAR SIR: Conductor Friday was speaking to me about the employment of his brother as a brakeman and advised that he
230 would if satisfactory, take him out on the road and break him in before he started to work.

I wish you would kindly advise Conductor Friday that this will be satisfactory but before making his trips out to secure regular transportation at my office for him. Also advise him to study up on the rules so that he can take an examination. Have him prepare regular application and take the physical examination before Dr. Norris.

Yours truly,

S. B. GRIMSHAW,
Ass't to Pres't & Gen. Mgr.
S."

DEFENDANT'S EXHIBIT "12."

The Santa Fe Central Railway Company.

S. B. Grimshaw.

Office of Assistant to President and General Manager.

SANTA FE, N. M., *May* 19, 1906.

Mr. F. H. McBride, Agent, Santa Fe.

DEAR SIR: As soon as you can get to it kindly arrange to have H. S. Friday examined on train rules, air, etc. If you have not time to look after it, have Conductor Friday give him an examination and advise me as soon as done. Also have him fill out application blank and send in.

Yours very truly,

S. B. GRIMSHAW,
Ass't to Pres't & Gen. Mgr.
S."

231 DEFENDANT'S EXHIBIT "13."

"HOUSE OF REPRESENTATIVES,
WASHINGTON, *December* 30, 1906.

S. B. Grimshaw, Esq., Gen'l Manager, Santa Fe, New Mexico.

MY DEAR GRIMSHAW: I herewith enclose you letter accompanied by a report of a Government Inspector, who has examined our cars and Locomotives. From the report, it looks as though our Master Mechanic, or whoever has this branch of business in charge, has been very negligent in looking after these several repairs, and if not immediately looked after and all repairs made, our road will be fined. You will please see that all these repairs are made, and kept repaired, and in good condition so far as these various repairs called for in the report.

I would have thought after the inspection by the Inspector, that Mess. Zink and McBride would have attended to these, possibly they have done so, if they have, please report the same to the Department

of the Interstate Commerce Commission, also please write me to that effect.

Yours very truly,

W. H. ANDREWS,
President & Gen'l Manager.

DEAR GRIM: Get a move on or we will not only be fined but prosecuted, so go after your people hard.

W. H. A."

232 DEFENDANT'S EXHIBIT "14."

"Interstate Commerce Commission.

Office of the Secretary.

Edward A. Moseley, Secretary.

WASHINGTON, *April* 27, 1906.

W. H. Andrews, Esq., President and General Manager, Santa Fe Central Railway Company, 1406 Arrott Building, Pittsburgh, Pennsylvania.

DEAR SIR: "Enclosed please find memorandum of inspection of safety appliances on equipment found in the yards of your company at Santa Fe, New Mexico, March 31, and at Estancia, New Mexico, April 2. 83 of the defects appear to be of such nature as to render your company liable to prosecution under the provisions of the safety appliance law.

The Commission feels confident that the conditions shown to exist upon your road result from failure of employés to carry out your instructions, and calls your attention to the matter in the hope that further cause of complaint may be speedily removed and the necessity avoided of reporting apparent violations of the laws to the United States Attorney for prosecution.

A statement from you upon the subject is desired.

Very respectfully,

E. A. MOSELEY, *Secretary.*"

DEFENDANT'S EXHIBIT "15."

"*Report of Inspector for the Interstate Commerce Commission.*

STATION ESTANCIA, NEW MEXICO, *April* 2, 1906.

Santa Fe Central Estancia Yard.

Name and title of official, Frank Zink, Superintendent of
233 Motive Power, Accompanied Government Inspector.

Initials of Car.	Kind of Car.	No.	Defect.
S. F. C.	Flt.	618.	Hand hold missing end of car."

DEFENDANT'S EXHIBIT "16."

"Santa Fe Central Railway Co.

ESTANCIA, 7-2, 1906.

Mr. S. B. Grimshaw, Ass't to Pres't & Gen. Mgr., Santa Fe, N. M.

DEAR SIR: The following work was done on a flat car 618. One new hand hold and others tightened up, draft timbers tightened up, one new truck spring, truss rods tightened and brake cylinder oiled.

Yours respectfully,

FRANK ZINK,
Supt. M. P. & R. S."

DEFENDANT'S EXHIBIT "17."

"Santa Fe Central Railway Company.

Office of Assistant to President and General Manager,
S. B. Grimshaw.

SANTA FE, N. M., *July* 5, 1906.

Mr. Edward A. Moseley, Sec. Interstate Commerce Commission, Washington, D. C.

DEAR SIR: In compliance with your letter of some time ago relative to equipment on our line, I beg to advise that the following cars have been repaired:

* * * * * * *

Car 618, one new hand hold and others tightened; draft
234 timbers tightened; one new truck spring; truss rod tightened and brake cylinder oiled.

* * * * * * *

Yours truly,

S. B. GRIMSHAW,
Ass't to Pres't & Gen. Mgr.
S."

Plaintiff here offers in rebuttal service commission and asks that the interpreter read it to the jury, and that it be marked Plaintiff's Exhibit "I."

By Mr. PRICHARD: "Your honor, I offer the balance of this report of E. A. Moseley, Secretary Interstate Commerce Commission, as Defendant's Exhibit '13.'"

Defendant will object to the remainder of it except that we be permitted to show that we have complied with all the conditions therein. And further object because it is incompetent, irrelevant and immaterial. Defendant offers to show by these documents, re-

ports and letters that all the defects set forth and specified in the report by the Car Inspector under the authority of the Interstate Commerce Commission, were complied with.

By Judge LAUGHLIN: "I state that to the court in order that the court may understand what we may try to do. I here offer report of Frank Zink, Superintendent, M. P. & R. S. dated Estancia, August 10, 1906, and addressed to S. B. Grimshaw, to refer only to the cars as mentioned in the report 621 and 1012."

Plaintiff objects.

Objection overruled as to so much of the letters as relate to these two cars. Objection sustained as to all other matters contained in said letters. Whatever the report shows as to the cars that were in Train No. 2 will be admitted.

235 PLAINTIFF'S EXHIBIT "J."

Report of Inspector for the Interstate Commerce Commission.

STATION ESTANCIA, NEW MEXICO, *April* 2, 1906.

Santa Fe Central Estancia Yard.

Initials of Car.	Kind of Car.	No.	Defects.
S. F. C.	Flt.	1012	Hand hold missing both ends car.
Do.	flt.	621	Hand hold missing both ends car.

DEFENDANT'S EXHIBIT "18."

"ESTANCIA, *August* 10, 1906.

S. B. Grimshaw, Ass't to Pres., & Gen. Mgr.

DEAR SIR: The following work has been done on cars at this place:

* * * * * * *

Car No. 621: New hand holds, draft timbers and steps tightened. Car No. 1012: New hand holds on both ends of cars. Draft timbers and steps tightened.

Respectfully,

FRANK ZINK,
Supt. M. P. & R. S."

Plaintiff rests.

Defendant rests.

Counsel on both sides waive the reading of the court's instructions to the jury before the argument, and consent that the instructions of the court may be delivered to the jury at the close of the arguments in this case.

I, A. M. Leeson, do hereby certify that I was duly sworn in open court to faithfully and to the best of my ability take the testimony offered on both sides during the trial of this case, and that I did take all the testimony offered by both sides, including all objections and exceptions made and taken by both sides, and the rulings of the court, in shorthand; and I do further certify that I have transcribed the same to the best of my knowledge and ability, and that the foregoing 178 pages and 18 lines contain a true and correct transcript of all the testimony offered by both sides, both oral and documentary, together with all the exceptions and objections, and the decisions and rulings of the court thereon, during the trial of this case, Santa Fe, N. M., December 31, 1908.

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(Signed) A. M. LEESON, *Stenographer.*

It is hereby agreed and stipulated that the foregoing proposed record and Bill of Exceptions may be settled, signed and sealed by the judge of said court, as the record on which the judgment in said cause may be reviewed by the Supreme Court of the Territory of New Mexico, and that the same may be filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, properly certified by the clerk of the said District Court, on or before the 11th day of January, 1909.

(Signed) GEO. W. PRICHARD,
Attorney for Paintiff.

(Signed) CHAS. F. EASLEY,
(Signed) N. B. LAUGHLIN,
Attorneys for Defendant.

Dated January 6, 1909.

Upon the foregoing stipulation, the foregoing record and Bill of Exceptions are settled, signed and sealed as those upon which said cause may be heard in the Supreme Court of the Territory of New Mexico.

237

(Signed) JOHN R. McFIE,
Associate Justice, etc., and Judge of the First Judicial District of the Territory of New Mexico.

Dated January 7, 1909.

In the District Court of the First Judicial District of the Territory of New Mexico.

No. 896, Civil.

HARRY SLOCUM FRIDAY, by His Next Friend, JOHN H. FRIDAY, Plaintiff,

vs.

THE SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

I, Francis C. Wilson, Clerk of the District Court of the First Judicial District of the Territory of New Mexico, do hereby certify that

the above and foregoing pages contain a true, correct, full and perfect transcript of the record and proceedings, as called for by the præcipe immediately following the index hereof, and of the bill of exceptions as signed by the Judge of said Court, in the above entitled cause, as the same remain of record and on file in my office.

In witness whereof, I have hereunto set my hand and the seal of the said District Court, at my office in the City of Santa Fe and Territory of New Mexico, this 6th day of January, A. D. 1909.

[SEAL.] (Signed) FRANCIS C. WILSON, *Clerk.*

238 In the District Court of the First Judicial District of the Territory of New Mexico.

No. 896, Civil.

HARRY SLOCUM FRIDAY, by His Next Friend, JOHN H. FRIDAY, Plaintiff,

vs.

THE SANTA FE CENTRAL RAILWAY COMPANY, Defendant.

Statement of Costs Incurred During the Trial of the Above Entitled Cause at the Sept., 1908, *Term of Court.*

Total amount due Clerk	$43.60	
Total amount due sheriff	23.50	
Total amount due witnesses	441.90	
Total amount due interpreter	20.00	
Total amount due stenographer	20.00	
	$549.00	$549.00
Agreed price on transcript (Clerk)		55.20
Agreed price on transcript (Stenographer)		116.64
Total		$720.84

I, Francis C. Wilson, Clerk of the District Court of the First Judicial District of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and correct statement of the costs in the above entitled cause, according to my best information.

In witness whereof I have hereunto set my hand and the seal of the said Court, this 6th day of Jan. A. D. 1909.

[SEAL.] FRANCIS C. WILSON, *Clerk.*

239 And Afterwards, on towit, *on* the said the ninth day of January, A. D., 1909, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors in the above entitled cause, which said assignment of errors was and is in the following words and figures towit:

UNITED STATES OF AMERICA,
Territory of New Mexico, County of Santa Fe:

In the Supreme Court of the Territory of New Mexico, First Judicial District.

No. 1262.

HARRY SLOCUM FRIDAY, by His Next Friend, JOHN H. FRIDAY, Appellee,
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY, Appellant.

Appeal from First Judicial District Court.

Assignment of Errors.

Comes now the above named appellant, The Santa Fe Central Railway Company, by its attorneys of record, and says that in the record, proceedings and trial of the above entitled cause in the court below, there are divers and sundry errors in this, to-wit:

1. The court erred in overruling the demurrer filed August 14th, 1907 interposed by appellant.

2. The court erred in sustaining appellee's motion to strike out certain parts of appellant's answer.

3. The court erred in sustaining appellee's demurrer to strike out certain portions of appellant's amended answer, as shown by the record.

4. The court erred in overruling appellant's demurrer filed on September 15th, 1908.

5. The court erred in receiving illegal and incompetent testimony offered by the appellee of the witnesses E. E. Friday, A. R.
240 Jones, M. J. De Mier, W. R. Ratliff, W. C. May, Ribert Taylor and Fred Fisher as to the conditions of cars on Train No. 2, other than car 618, upon which it is alleged, the injuries complained of occurred.

6. The court erred in admitting in evidence Exhibits "A", "B", "C", "D", "E", "F", "G", "H" and "I" offered by appellee.

7. The court erred in excluding legal and competent testimony offered by appellant, all of which appears on the face of the record.

8. The court erred in instructing the jury on parts of the Act of the Congress known as the safety appliance law, and not instructing as to all of that law.

9. The court erred in giving to the jury the following instructions: "You are the judges of the weight of the evidence and of the credibility of the witnesses who have testified in this case, and if you believe that the evidence is conflicting to such extent that you cannot believe it all, then it is for you to determine what part of it is true, and what part of it is knowingly and wilfully false."

10. The court erred in failing to number his instructions given to the jury in consecutive paragraphs, as the law requires.

11. The court erred in giving instructions asked by appellee, and in refusing to give instructions asked by appellant, all of which appears on the face of the record.

12. The court erred in rendering judgment for appellee and against the appellant when it did not appear from the record in what judicial district of the Territory of New Mexico, the injuries complained of occurred.

13. The court erred in assuming jurisdiction of the case, which was commenced and tried under a law declared void.

14. The court was without any jurisdiction to hear and de-
241 termine the case because the Act of the Congress under which the court assumed jurisdiction, was retroactive and void.

15. The court had not any jurisdiction to hear and determine the case because the Act of the Congress under which the court assumed jurisdiction, was retroactive and void.

16. The court erred in denying appellant's motion for a new trial.

17. The court erred in denying appellant's motion in arrest of judgment.

18. The court erred in divers and sundry rulings and decisions in the proceedings and trial of said cause, all of which are apparent on the face of the record.

All of which errors the appellant prays may be inquired into and reviewed by this honorable court.

N. B. LAUGHLIN,
C. F. EASLEY,
Attorneys for Appellant, Santa Fe, N. M.

E. W. DOBSON,
Of Counsel.

And Afterwards, *on* to-wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government on the First Wednesday after the first Monday in January, A. D., 1909, on the Fifteenth day thereof, the same being Friday, August 27th, A. D., 1909, the following among other proceedings were had and entered of record to wit:

No. 1262.

HARRY SLOCUM FRIDAY, by JOHN FRIDAY, His Next Friend,
Appellee,
vs.
SANTA FE CENTRAL RAILWAY, Appellant.

Appeal from First Judicial District Court.

This cause coming on for hearing upon the transcript of record assignment of erors and briefs of counsel, is argued by E. W.
242 Dobson, Esq. for appellant, and George W. Prichard, Esq. for appellee, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And Afterwards, *on* to-wit at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in February, A. D., 1910, on the Third day thereof the same being Monday, February 28th, A. D., 1910, the following among other proceedings were had and entered of record, to-wit:

No. 1263.

HARRY SLOCUM FRIDAY, by JOHN H. FRIDAY, His Next Friend, Appellee,

vs.

THE SANTA FE CENTRAL RAILWAY CO., Appellant.

Appeal from First Judicial District Court.

This cause having been argued by counsel, submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice W. H. Pope, Chief Justice Mills, and Associate Justices Parker, Abbott and Colley, concurring, affirming the judgment of the Court below, for reasons stated in the opinion of the court on file: It is therefore considered and adjudged by the court that the judgment of the District Court in and for the First Judicial District, whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith, It is considered and adjudged by the Court that the appellee, herein Harry Slocum Friday, by John H. Friday, his next friend, do have and recover of and from the appellant the Santa Fe Central Railway, as principal, and from W. S. Hopewell, and Thomas P. Gable, as sureties, the sum of Seven Thousand Five Hundred Dollars, with interest thereon at
243 the rate of six per cent per annum from the 12th day of October, A. D., 1908, until paid, also his costs in this action for which let *w*xecution issue.

And Afterwards, on towit, on the Fourth day of the said regular term, the same being Wednesday, March 2nd A. D., 1908, the following among other proceedings were had and entered of record, towit:

No. 1262.

HARRY SLOCUM FRIDAY, by JOHN H. FRIDAY, His Next Friend, Appellee,

vs.

THE SANTA FE CENTRAL RAILWAY COMPANY. Appellant.

Appeal from District Court, — Judicial District.

Now comes E. W. Dobson, Esq., Attorney for Appellant, and moves the court to be granted thirty days within which to file a motion for rehearing herein, and the court being sufficiently ad-

vised in the premises, grants the same. It is therefore considered and adjudged by the court that the appellant do have and hereby is granted thirty days from this date within which to file a motion for rehearing herein.

And Afterwards, on towit, *on* the 7th day of March, A. D. 1910, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for a rehearing in the above entitled cause, which said motion for a rehearing was and is in the following words and figures towit:

244 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

No. 1262.

HARRY SLOCUM FRIDAY, by JOHN H. FRIDAY, His Next Friend, Appellee,

vs.

THE SANTA FE CENTRAL RAILWAY COMPANY, Appellant.

Appeal from District Court, First Judicial District.

Now comes the appellant in the above entitled cause by its attorneys, and moves the Court to grant unto it a re-hearing of said cause for the following reasons to-wit.

1. Because the District Court of the First Judicial District of the Territory of New Mexico had no jurisdiction or authority to try said cause.

2. Because under the Organic Act of the Territory of New Mexico, the District Courts of the several counties have exclusive jurisdiction for the purpose of hearing and determining all matters and causes except those to which the United States is a party.

3. Because under the laws of the Territory of New Mexico, the District Court held in and for the different counties shall have original jurisdiction in all cases, civil and criminal, in which the jurisdiction is not especially delegated to some other court.

4. Because the question of jurisdiction and power of the District Court of the First Judicial District of the Territory of New Mexico to hear and determine *d*said cause was not presented or argued upon the former hearing of this cause.

5. Because the question of jurisdiction and the power of the court to hear and determine actions can be raised at any time and it is the duty of the Appellate Court to consider the jurisdictional question of the trial court, whether presented upon the trial of the cause in the lower court or not.

245 6. Because according to the opinion rendered in the above cause it affirmatively appears that the jurisdictional question was not considered.

N. B. LAUGHLIN,
CHAS. F. EASLEY,
Attorneys for Appellant.

E. W. DOBSON,
Of Counsel.

And Afterwards, on towit, on the tenth day of the said regular term, the same being Tuesday, July, 26th, A. D., 1910, the following among other proceedings were had and entered of record, towit:

No. 1262.

HARRY SLOCUM FRIDAY, by JOHN H. FRIDAY, His Next Friend, Appellee,
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY, Appellant.

Appeal from First Judicial District Court.

This cause coming on upon the motion of appellant for a rehearing herein, on the ground that the Court below did not have jurisdiction to hear the cause, and the court having had the said motion under advisement and being now sufficiently advised in the premise-, grants the said motion on the said ground and sets the same for hearing gor the twenty-third day of August. It is therefore considered and adjudged by the court that the motion for rehearing herein by appellant, be and the same hereby is granted only on the question of the jurisdiction of the Court below, to hear said cause, and this cause is hereby set for hearing on the said question of the jurisdiction of the court below, for the twenty-third day of August, A. D., 1910.

And Afterwards, on towit, on the Twenty-seventh day of the said regular term, the same being Tuesday, August 23rd A. D.
246 1910, the following among other proceedings were had and entered of record, towit:

No. 1262.

HARRY SLOCUM FRIDAY, by JOHN H. FRIDAY, His Next Friend, Appellee,
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY, Appellant.

Appeal from District Court, First Judicial District.

This cause coming on for hearing before the court upon the question of the jurisdiction of the court below, and the same is argued by E. W. Dobson, Esq., for appellant, and George W. Prichard, Esq., for appellee, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And Afterwards on towit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe on the first Wednesday, after the first Monday in January, A. D., 1912,

on the Forty-seventh day of the said term, the same being Friday, December 22nd, A. D., 1911, the following among other proceedings were had and entered of record, towit:

No. 1262.

HARRY SLOCUM FRIDAY, by JOHN H. FRIDAY, His Next Friend, Appellee,
vs.
SANTA FE CENTRAL RAILWAY COMPANY, Appellant.

Appeal from First Judicial District Court.

This cause coming on before the court on rehearing herein and the court having heard argument herein and taken the same under advisement upon a former day of the present term, and being now sufficiently advised in the premises, announces its decision per curiam, adhering to the opinion and judgment of the court herein. It is therefore considered and adjudged by the court that the judgment and decree of this court heretofore entered
247 herein be and the same is hereby adhere- to.

And afterwards, on towit, on the first day of March, A. D., 1912, there was filed in the office of the Clerk of the Supreme Court of the State of New Mexico, a supersedeas Bond in the above entitled cause, which said supersedeas Bond was and is in the following words and figures towit:

In the Supreme Court of the Territory (Now State) of New Mexico.

No. 896.

HARRY S. FRIDAY, Appellee,
vs.
SANTA FE CENTRAL RAILWAY COMPANY, Principal, and W. S. HOPEWELL and THOMAS P. GABLE, Sureties.

Supersedeas Bond.

Know all men by these presents, That we New Mexico Central Railway, a corporation created under the laws of the Territory of New Mexico, Successor of Santa Fe Central Railway Company, in the hands of Charles C. Murray, Receiver, and Willars S. Hopewell, and Thomas P. Gable, as principals, and Southwestern Surety Insurance Company of Oklahoma, a corporation, and being duly registered and authorized to do business in the State of New Mexico, as surety, are jointly and severally firmly bound unto Harry S. Friday, in the sum of Twenty-thousand Dollars ($20,000) lawful money of the United States of America, to be paid to the said Harry S. Friday, for which payments well and truly to be made, we bind ourselves,

our successors, heirs, executors and administrators jointly and firmly by these presents.

Signed with our hands and sealed with our seals and dated this first day of March, A. D., 1912.

The condition of the above obligation is such that, whereas,
248 the above named New Mexico Central Railway Company as successor of Santa Fe Central Railway, by its Receiver Charles C. Murry, and Willard S. Hopewell and Thomas P. Gable have appealed to the Supreme Court of the United States from the judgment entered against them in the above entitled action by the Supreme Court of the Territory of New Mexico, in favor of the above named Harry S. Friday, rendered on the 22nd day of December, A. D., 1911, for the sum of Seven Thousand Five Hundred Dollars with interest thereon at the rate of six per cent. per annum from the 12th day of October, 1908, together with the costs therein, which said appeal to the said Supreme Court of the United States was granted in open court by the said Supreme Court of the Territory of New Mexico, and on the 2nd day of January, A. D., 1912.

Now therefore, if the said New Mexico Central Railroad Company as successor of the Santa Fe Central Railway Company, or Charles C. Murry, as Receiver of said Company, and the said Willard S. Hopewell and Thomas P. Gable, shall prosecute their appeal with effect and without delay, and answer all damages and costs, if the said appeal should be dismissed, or should they fail to make their plea good, and shall perform and abide the judgment of the Supreme Court of the United States in the premises, then this obligation shall be null and *b*oid, otherwise to remain in full force and effect.

This bond is executed by said Charles C. Murry as Receiver of said New Mexico Central Railway Company in pursuance of and subject to the terms and provisions of a certain order made by the District Court of Santa Fe County in the State of New Mexico, on February, 29th, 1912, in the case of the Independent Steel and Wire Company vs. New Mexico Central Railroad Company, No. 6566 of said Court.

NEW MEXICO CENTRAL RAILROAD COMPANY,
Successor of Santa Fe Central Railway Company,
By CHARLES C. MURRY, [SEAL.]
Its Receiver.

[Seal N. M. C. R. R.]

249 WILLIAM S. HOPEWELL. [SEAL.]
THOMAS P. GABLE. [SEAL.]

Witness
A. M. LEASON.

[SEAL.] SOUTHWESTERN SURETY INSURANCE COMPANY OF OKLAHOMA,
By JOHN W. MAYES, [SEAL.]
Its Attorney in Fact and Agent.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this first day of March, 1912, before me personally appeared Charles C. Murry, who after being first duly sworn did say that he is the Receiver duly appointed, qualified and acting of the said New Mexico Central Railray Company the above named corporation, and that the seal affixed to the foregoing Supersedeas Bond is the corporate seal of the said corporation, and that the said bond was signed and sealed by him in behalf of said corporation, and as authorized and directed by the District Court of the First Judicial District sitting within and for the County of Santa Fe, and State of New Mexico, on the 29th day of February, 1912, and that the said Charles C. Murry acknowledged said instrument to be the free act and deed of said corporation, and in compliance with said order of said court.

In testimony whereof, I have hereunto set my hand and affix my official seal the day and year in this certificate first above written.

[SEAL.] ANNA M. LEASON,
Notary Public.

My Commission expires June 21, 1913.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 1st day of March, 1912, before me personally appeared Willard S. Hopewell and Thomas P. Gable, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In testimony whereof, I have hereunto set my hand and
250 affised my official seal the day and year last above written in this certificate.

[SEAL.] ANA M. LEASON,
Notary Public.

My Commission Expires June 21, 1913.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 1st day of March, 1912, before me appeared John W. Mayes, to me personally known, who being by me duly sworn did say that he is the agent and attorney in fact for the Southwestern Surety Insurance Company, of Oklahoma, the above and foregoing named Surety Corporation, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation, by authority of its Board of Directors, and that said John W. Mayes, as agent and attorney in fact, acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof, I have hereunto set my hand and affixed

my official seal the day and year last above written in this certificate.

[SEAL.] ANNA M. LEASON,
Notary Public.

My Commission Expires June 21, 1913

I hereby approve the foregoing bond as to form and sufficiency of sureties this 1st day of March, A. D., 1912

CLARENCE J. ROBERTS,
Chief Justice.

And Heretofore, on towit *on* the twenty-eighth day of February, A. D., 1910, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court was and is in the following words and figures towit:

251 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

No. 1262.

HARRY SLOCUM FRIDAY, etc., Appellee,
vs.
SANTA FE CENTRAL RAILWAY CO., Appellant.

Appeal from First Judicial District Court.

Syllabus.

1. The Record in this case, (especially when aided by our statute as to amendments of the record in formal matters even after appeal) sufficiently shows the injuries alleged to have occurred in the First Judicial District.

2. Judicial notice is taken of the counties composing a Judicial district and of the county in which known railroad stations or points on a railroad line at known distances from such stations are located.

3. The federal employer's liability act of June 11, 1906 is valid as to the Territory of New Mexico (following El Paso & N. E. Railway Company v. Gutierrez U. S. decided November 15, 1909).

4. This Court will not review instructions not excepted to in the trial court.

5. Assignments of error on the admissibility of testimony must, to be cognizable by this Court, point out specifically the testimony deemed objectionable.

6. Under the rule of practice just stated an assignment alleging error in the reception of the testimony, upon a given point, of some seven witnesses, whose testimony upon that point went in under different circumstances and against varying objections, is too general to be entertained and is contrary to rule 14 of this court requiring each error to be stated in a separate paragraph.

The facts are stated in the opinion.

252 *Opinion of the Court.*

POPE, *J.*:

The plaintiff brought suit for personal injury in the First Judicial District Court. The verdict was in his favor and the defendant railroad company, appeals. The errors assigned will be considered seriatim.

It is said first that the complaint does not show jurisdiction in that it does not allege the injury to have occurred within the first judicial district. This point does not appear to have been made before trial in the Court below, but as it is claimed to be jurisdictional we proceed to consider whether it is fatal to the judgment rendered. The question of jurisdiction thus raised is, it will be noted, extremely narrow and is one purely of pleading, and we shall in dealing with it confine ourselves to the specific objection urged. While the complaint does not in terms state that the injury occurred in the first district, the cause is entitled "In the District Court of the First Judicial District." We judicially know that this district was at the date the suit was brought composed of the Counties of Santa Fe, San Juan, Rio Arriba and Taos. The caption is thus to be read as naming those counties as constituting the district. The case would thus seem to be within the provision of section 59 of the Code, which is relevant as regulating procedure on the federal side of the Court and which provides:

"The name of the county stated in the complaint shall be taken to be the venue intended by the plaintiff, and it shall not be necessary to state a venue in the body of the complaint or in a subsequent pleading."

But aside from this, the complaint alleges the injury to have occurred on the Santa Fe Central Railway between the stations of Williams Spur and Clark. These latter being railroad stations, their location may be judicially noticed and are known to us to be within the County of Santa Fe, which latter is, as above stated, judicially known to have been at that date within the First Judi-

253 cial District. Reading the complaint therefore, in the light of judicial knowledge it sufficiently alleges the injury to have occurred in the first district.

In addition, the undisputed testimony received without objection and from both sides is to the effect that the injury occurred on defendant's line between mile posts thirty-two and thirty-three south of the City of Santa Fe. This point being also judicially known to us to be in Santa Fe County, it thus results that the undisputed testimony is that the casualty occurred in the first district. If therefore the complaint be defective in the request alleged it is under the condition of the record a mere defect of form without possibility of prejudice to any one and is even at this stage of the case subject to amendment under Code 85 which provides that "the Court shall in every stage of the action disregard any * * * defect * * * in the pleadings which shall not effect the substantial rights of the adverse party" and that "no judgment shall be reversed * * *

by reason of the defect." It is also within section 86 of the Code which provides that "after final judgment rendered in any cause the court may in furtherance of justice * * * amend in affirmance of such judgment any * * * pleading * * * by rectifying defects * * * in matters of form; and such judgment shall not be reversed or annul-ed therefor."

The federal statute on amendments (R. S. Sec. 954) is similarly liberal. As is said in 1 En. P. & Pr. 511:

"Where the court has jurisdiction of the subject matter and the defendant has appeared in person to contest the merits the complaint may be amended by inserting averments necessary to perfect the jurisdiction of the court on the record."

Of course, were the record silent as to where the injury occurred or were the *the* proofs subject to the least question on the point the matter would be one of substance and perhaps within the rule of the federal courts that jurisdiction must affirmatively appear. Here, however, the testimony of both sides does show the proper county and the only criticism is that the complaint does not allege it. We entertain no doubt of our power to correct this even on appeal.

254 Indulging—without sustaining—the contention that the complaint does not sufficiently aver the venue, we may therefore easily deem the omission under the condition of this record purely one of form and consider the complaint amended to conform to the undisputed facts showing the injury to have occurred in the First Judicial District and thus hold the criticism upon the complaint insufficient to necessitate a new trial.

It is strongly urged in the second place that the trial court erred in applying to the case the rules contained in the federal Employers' Liability Act of June 11, 1906, for the reason that that act has by the opinion in Howard v. Illinois Central Co. 207 U. S. 463 been declared unconstitutional and void not only as to the states but as well to the Territories. Decisions to the effect that the Act was left by the Howard case intact as to the Territories are cited from the District of Columbia in Hyde v. Southern Railway Co., 31 App. D. C., 466 and Gutierrez v. E. P. & N. E. Ry. Co., 117 S. W. 426, while the contrary view is asserted in at least one Texas case. A. T. & S. F. Ry. Co., v. Mills 108 S. W. 480. We are, however, relieved from the necessity of comparing these lines of authority and of determining for ourselves the extent of the holding in the Howard case by the fact that the federal Supreme Court has itself since the argument of this case expressly held in El Paso & N. E. Ry. Co., v. Gutierrez (decided November 15, 1909) the act of 1906 to be as to the Territories a valid exercise of congressional power. We content ourselves with referring to that controlling authority in holding this assignment of error not well taken.

While the two foregoing are the only assignments of error argued either orally or upon the briefs, appellant's brief also mentions as insisted upon two other alleged errors. One is that the court erred in its instruction as to the functions of the jury in passing upon the weight of the evidence. It is sufficient to say, however, that the rec-

ord shows no exceptions reserved to this or any of the in-
255 structions and their assignment may not therefore be considered. Territory v. O'Donnell 4 N. M. 196; Laird v. Upton 8 N. M. 409; Fruit Exchange Co. v. O'Donnell 9 N. M. 366.

The remaining assignment is as follows:

"The Court erred in receiving illegal and incompetent testimony offered by the appellee of the witnesses E. E. Friday, A. R. Jones, M. J. De Mier, W. R. Ratliff, W. G. May, Robert Taylor and Fred Fisher as to the condition of cars in Train No. 2, other than car 618, upon which it is alleged the injuries complained of occurred." This allegation of error does not point out specifically the objectionable testimony of any one of the witnesses named, much less of the seven. It imposes upon the court the duty of going through a lengthy record with the view to segregating what testimony in the examination of each of the witnesses named is within the objection made and then of deciding whether such testimony so segregated is in either case subject to that objection. An examination of the record shown that some of the testimony upon the point went in without objection, some was brought out by defendant itself on cross-examination, while some was admitted over one ground of objection and some over another. In some instances the question was objected to because immaterial, in others as leading and in others upon still other grounds. We do not feel called upon to entertain an assignment so general in its character and involving such a diversity of question. Each of the rulings of the court upon this class of testimony constituted a ground for alleging error depending for its validity upon varying considerations. It is conceivable that some of this testimony may have been properly admitted over the objection made and some of it not. Rule 14 of this court provides that "each error relied upon shall be stated in a separate paragraph."

We do not consider the assignment made as complying with that rule. We believe it to be within the decision of this court in Pearce v. Strickler 9 N. M. 467 and Schofield v. Territory 9 N. M. 534 where it is said that "it is not incumbent upon this court to search the entire record for such evidence as the counsel might have
256 had in mind."

We consider it no unreasonable tax upon the diligence of the bar to require separate assignments of error for the several matters of evidence objected to. To permit objections to all of the testimony upon a given point not only of one but of seven witnesses to be combined under a single assignment would be to disregard the very salutary rule of this court above named, the decision just cited enforcing it and the principles which must govern the orderly presumption of causes upon appeal.

The Judgment below is affirmed.

WM. H. POPE,
Associate Justice.

We Concur:
WILLIAM J. MILLS, *Chief Justice.*
FRANK W. PARKER, *A. J.*
IRA A. ABBOTT, *A. J.*
ALFORD W. COOLEY, *A. J.*

Associate Justice McFie having tried the case did not participate, nor did Associate Justice Mechem.

257 And Afterwards, on towit, *on* the twenty-second day of December, A. D., 1911, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court was and is in the following words and figures towit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

No. 1262.

HARRY SLOCUM FRIDAY, by JOHN H. FRIDAY, His Next Friend, Appellee,
vs.
THE SANTA FE CENTRAL RAILWAY COMPANY, Appellant.

Appeal from First Judicial District Court.

Opinion of the Court.

Per Curiam:

Upon an examination of the grounds urged upon rehearing, we are of opinion that they are not well taken and the original opinion filed herein and the judgment entered thereunder, will be adhered to. An order may be entered to that effect.

WILLIAM H. POPE,
Chief Justice.

258 STATE OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the State of New Mexico, do hereby certify that the above and foregoing 257 pages contain a true, full, complete and correct transcript of the record and proceedings, pleading and opinions in the above entitled cause, which hereby is transmitted to the Supreme Court of the United States, in obedience to the command of the writ of error filed in the office of the said Clerk of the Supreme Court of New Mexico and hereto attached.

Witness my hand and the seal of the Supreme Court of New Mexico, this the 15th day of March, A. D., 1912.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

Endorsed on cover: File No. 23,161. New Mexico Territory Supreme Court. Term No. 230. The Santa Fe Central Railway Company and W. S. Hopewell and Thomas P. Gable, its sureties, plaintiffs in error, vs. Harry Slocum Friday, by John H. Friday, his next friend. Filed April 16th, 1912. File No. 23,161.

12

Office Supreme Court, U. S.
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CLERK

Brief of Plaintiffs In Error.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1913

No. 230

THE SANTA FE CENTRAL RAILWAY COMPANY AND W. S. HOPEWELL AND THOMAS P. GABLE, ITS SURETIES, *Plaintiffs in Error,*

vs.

HARRY SLOCUM FRIDAY, BY JOHN H. FRIDAY, HIS NEXT FRIEND, *Defendants in Error.*

In Error to the Supreme Court of the Territory of New Mexico.

E. W. DOBSON,
Attorney for Plaintiffs in Error,
Albuquerque, New Mexico.

ALBRIGHT & MORRISON, PRINTERS-BINDERS, ALBUQUERQUE

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IN THE SUPREME COURT OF THE UNITED STATES.

No. 230.

THE SANTA FE CENTRAL RAILWAY COMPANY AND W. S. HOPEWELL AND THOMAS P. GABLE, ITS SURETIES, *Plaintiffs in Error,*

vs.

HARRY SLOCUM FRIDAY, BY JOHN H. FRIDAY, HIS NEXT FRIEND, *Defendants in Error.*

In Error to the Supreme Court of the Territory of New Mexico.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

The appellant is a corporation organized under the laws of the Territory (now state) of New Mexico, and was operating a line of railroad from the City of Santa Fe, in Santa Fe County, to the town of Torrance in the County of Torrence, New Mexico, on and prior to December 1st, 1906.

The appellee was a resident of Santa Fe County, New Mexico, and that on the first day of De-

cember, 1906, at a point on said railroad between Williams Spur and Clark Station in Santa Fe County, appellee while in the service of appellant as a brakeman, received personal injuries by having his arm broken which resulted in the amputation of the same below the elbow, also a bruised, cut and lacerated face and lip alleged to have been caused by a defective and insufficient brake wheel and brake staff on car No. 618, being one of the cars in said railroad train on said date.

This suit was filed April 10th, 1907, *in the district court of the First Judicial District of the Territory of New Mexico, setting for the trial of causes arising under the laws of the United States, under the provisions of the Act of Congress known as the Employers' Liability Act, approved June 11th, 1906.*

The defendant company and appellant filed a demurrer to said complaint, among other grounds alleging that the Act of Congress of June 10th, 1906, was unconstitutional, and that the district court of the First Judicial District of the Territory of New Mexico, sitting for the trial of causes arising under the laws of the United States, had no jurisdiction over the parties or the subject matter; the demurrer was overruled, defendant answered and the cause was tried before a jury selected form the *First Judicial District,* to which objections were made and exceptions taken; the jury returned a verdict in favor of appellee for the sum of $7,500.00 damages; motion for new

trial was filed and overruled, and a motion in arrest of judgment was also filed and overruled; objections and exceptions to such rulings were taken, and thereafter the cause was appealed to the Supreme Court of the Territory of New Mexico, and the judgment of the lower court affirmed. (The judgment of the Supreme Court of the Territory is found at page 167 of printed record.) Motion for rehearing was filed and granted, and the court after argument adhered to its former opinion. Writ of error was sued out and supersedeas bond given for the purpose of review in the Supreme Court of the United States.

ASSIGNMENT OF ERRORS.

I.

The Supreme Court erred in affirming the judgment of the lower court.

II.

The Supreme Court erred in holding that the District Court of the *First Judicial District of the Territory of New Mexico sitting for the trial of causes arising under the laws of the United States*, had jurisdiction over the parties or the subject matter or that said court had jurisdiction to try said cause.

III.

The Supreme Court erred in the judgment rendered upon the rehearing, in adhering to its former decision.

THE ORGANIC ACT, THE ACTS OF CONGRESS AND THE LEGISLATIVE ACTS MUST ALL BE CONSIDERED, AND CONSTRUED IN DETERMINING THE QUESTION.

I.

ORGANIC ACT.

Section 10 of the Organic Act, approved September 30th, 1850, provides:—

> "That the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice, and two assicoate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said territory annually, and they shall hold their offices during the period of four years. The said territory shall be divided into three judicial districts, and a *district court* shall be held in each of said districts by one of the justices of the supreme court, at such time and place as may be prescribed by law; and the said judges shall, after their appointments, respectively, reside in the districts which shall be assigned them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, *shall be as limited by law.*"
>
> * * * * * *
>
> "and each of said *district courts* shall have and exercise the same jurisdiction in all cases arising under the constitu-

> tion and laws of the United States as is vested in the circuit and district courts of the United States; and the said supreme and distirct courts of the said territory, and the respective judges thereof, shall and may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the United States in the District of Columbia; and the first six days of every term of said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws."

The Territorial Acts relative to jurisdiction of the district courts are as follows:

Section 880 of the Compiled Laws of New Mexico, 1897, passed January 3rd, 1852:—

> "The judges of the supreme court of the Territory of New Mexico are hereby required to hold the district courts in the respective districts to which they have been assigned, and in each county of said districts, for the disposal of all civil and criminal business within said counties, in exact conformity with law."

Section 1040 of the Compiled Laws New Mexico, 1897, passed July 12th, 1851:—

> "The district court shall have original jurisdiction in all cases civil and criminal in which the jurisdiction is not specially delegated to some other court, and such appellate and supervisory jurisdic-

tion as may be given them by law."

Section 900 of the Compiled Laws New Mexico, 1897, passed September 22nd, 1846:—

> "The district court in the several counties in which they may be held shall have power and jurisdiction as follows:
> "First, of all criminal cases that shall not otherwise be provided for by law; Second, *exclusive original jurisdiction in all civil cases* which shall not be cognizable before probate judges and justices of the peace; Third, appellate jurisdiction from the judgments and orders of the probate judges and justices of the peace in all cases not prohibited by law, and shall possess a superintending control over them."

Section 901 of the Compiled Laws New Mexico, 1897, passed January 26th, 1859:—

> "The district courts in the various counties shall have jurisdiction in all civil causes in said counties which according to law belong to the *district courts* (meaning territorial district courts), and of all criminal causes that may originate in said counties, or that may be presented by indictment, information or by appeal."

Section 904 of the Compiled Laws of 1897, provides:

> "District Courts are hereby establish-

ed in each of the several counties of this territory."

Section 905 of the Compiled Laws New Mexico, 1897, passed January 20th, 1859:—

> "It shall be the duty of the judges, in their respective districts in this territory, to hold two terms of the district court every year within the counties of their respective districts, and in the places and times that may be fixed by law."

Section 2950 of the Compiled Laws New Mexico, 1897, passed January 7th, 1876:—

> "All civil actions which may hereafter be commenced in the district courts shall be brought and shall be commenced in counties as follows, and not otherwise:
> First. 1st., all transitory actions shall be brought in the county where either the plaintiff or the defendant or some one of them, in case there be more than one of either, resides; 2nd., or in the county where the contract sued on was made or is to be performed, or where the cause of action originated, or indebtedness sued on was incurred; 3rd., or in any county in which the defendant, or either of them, may be found in the judicial district where the defendant resides." * * *

Kearny Code, September 22nd, 1846, Section 18, is as follows:

> "The circuit courts in the several

counties in which they may be held shall have the power and jurisdiction as follows:

First, of all criminal cases that shall not be otherwise provided for by law:

Second, *exclusive original jurisdiction in all civil cases which shall not be cognizible before the prefects and alcaldes;*

Third, appellate jurisdiction from the judgments and orders of the prefects and alcaldes in all cases not prohibited by law and shall possess a superintending control over them."

The Acts of Congress relating to territorial courts, and their jurisdiction pertinent are as follows:

Section 1874 Revised Statutes of the United States, passed June 14th, 1858, is as follows:

"Sec. 1874. The judges of the supreme court of each territory are authorized to hold court within their respective districts, in the counties wherein, by the laws of the territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes, *except those in which the United States is a party;* but the expense of holding such court shall be paid by the territory or by the counties in which the courts are held, and the United States shall in no case be chargeable therewith."

Section 1910 Revised Statutes of the United

States, passed September 9th, 1850, is as follows:

> "Sec. 1910. Each of the district courts in the territories mentioned in the preceding section shall have and exercise the same jurisdiction, in all cases arising under the constitution and the laws of the United States, as is vested in the circuit and district courts of the United States; and the first six days of every term of the respective district courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under such constitution and laws; but writs of error and appeals in all such cases may be had to the supreme court of each territory, as in other cases."

II.

The organic act (1850) hereinbefore quoted from provides for Supreme Court, District Courts, Probate Courts and Justices of the Peace with jurisdiction *shall be as limited by law*, meaning as provided by the Legislature of the Territory. It then says that the District courts shall have jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the Circuit and District courts of the United States, and also provides that the first six days of the court shall be appropriated to the trial of causes "arising under such constitution and laws." The Territory at that time was divided into three judicial districts and it was provided that courts should be held in each of said districts,

but nothing was said in regard to courts to be held in the counties, but left the matter of county courts to be provided for by the Legislature and to proscribe by law the time and place of holding the same. In 1852 the Territorial Legislature (now section 880 of the Compiled Laws New Mexico, 1897) provided that the judges of the Supreme Court were required to hold court in their respective districts to which they had been assigned in each county of their district.

Section 900 Compiled Laws New Mexico, 1897, provides that the district courts in the several counties should have jurisdiction as follows:

"First—All criminal actions that shall not otherwise be provided for by law:

Second—*Exclusive original jurisdiction in all civil actions that shall not otherwise be provided for by law.*"

Section 901 of the Compiled Laws New Mexico, 1897, which was approved January 26th, 1859, then provides that "district courts in the various counties shall have *jurisdiction in all civil causes in said county which according to law belong to the District Courts.* (Meaning Territorial District courts.)

The foregoing quotation from Section 901 read in connection with Section 900 means that the district courts held in the various counties should *have exclusive original jurisdiction in all causes* and that the Territorial District Courts referred to in the Organic act referred to the three dis-

tricts that the territory was then divided into.

Section 905 then makes it the duty of the judges provided for by the Organic Act to hold two terms each year in each county in their respective districts.

In 1876 (Section 2950 of the Compiled Laws New Mexico 1897) the Territorial Legislature then fixed the forum in which all civil actions should be commenced and provided that the same should be brought or commenced in the county where either the plaintiff or defendant—or some one of them, in case there were more than one of either resides—or in the county where the contract sued on was made or was to be performed, or where the debt was incurred.

Congress in 1858 (Sec. 1874 United States Revised Statutes) expressly authorized the judges of the Supreme Court to hold court in the counties in their respective districts "wherein by the laws of the Territory courts have been or may be established," for the purpose of hearing and determining all matters and causes "except those in which the United States is a party."

We therefore have provisions for district courts of the Territory and District Courts for each of the various counties and a Terirtorial law giving the district courts in the counties *exclusive original jurisdiction in all civil actions and fixing the forum where they must be brought or commenced.*

Appellant contends that the courts in the various counties having been established by Territor-

ial Legislation previous to the enactment of Section 1874 (United States Revised Statutes) or which were by law established subsequent to that time, in the counties of the Territory for the trial of all civil causes, *except those in which the United States was a party,* that the jurisdiction of the so-called United States District Courts existing previous to the enactment of said section 1874, vested in and passed to the District Courts of the various counties, and out of the so-called United States courts, except in causes where *the United States is a party.*

Attention is called to the case of Schofield vs. Stephens, 7 N. M. 619, which decided that the "District Courts for the Counties" organized in pursuance of the act of the legislature and the judicial district courts provided by section 1910 Revised Statutes had concurrent jurisdiction in a case brought by a Receiver of an insolvent National bank. The only question involved in that case was whether or not the District Court for the Fifth Judicial District had jurisdiction to hear and determine a cause brought by the Receiver of a National bank, and the court decided that a National bank being created by the laws of the United States that a Receiver of a National bank was an officer of the United States, therefore, the Fifth Judicial District Court had jurisdiction.

By section 1874 authority was given the legislature of the then Territory of New Mexico to create courts to be held in the various counties and

to authorize such courts when created to exercise all the jurisdiction formerly exercised by the so-called United States courts with the single exception of causes in which *the United States was a party.*

Congress did not define the jurisdiction of the district courts except as federal courts, but as *courts of the Territory they have such jurisdiction as the territorial legislature might prescribe.* The territorial legislature provided that the district courts should have original jurisdiction in all cases, civil and criminal, in which the jurisdiction is not especially delegated to some other court, and Section 900 Compiled Laws of New Mexico, of 1897, among other things provided that the district courts in the several counties shall have "*exclusive original jurisdiction in all civil cases which shall not be cognizable before probate judges and justices of the peace.*"

General Kearny in 1846 made the following provision which appears as Section 18 in the Kearny Code:

> "Sec. 18. The circuit courts in the several counties in which they may be held shall have the power and jurisdiction as follows: First, of all criminal cases that shall not otherwise be provided for by law; second, *exclusive, original jurisdiction in all civil cases which shall not be cognizable before prefects and alcaldes;* third, appellate jurisdiction from the judgments and orders of the prefects and alcaldes in all cases not prohibited

by law, and shall exercise superintending control over them."

The second provision as to jurisdictional powers of the "circuit courts in the several counties" using the following language: "exclusive original jurisdiction in all civil cases which shall not be cognizable before prefects and alcaldes" indicates that the district courts of the counties not only under the Kearny Code but also under the Act of June 14th, 1858, which provided for the establishment of district courts in counties "for the purpose of hearing and determining all matters and causes," had exclusive jurisdiction, except when the United States was a party.

All of the district courts in the counties in the First Judicial District were created by the Legislature of the Territory of New Mexico, and under and by virtue of Sec. 1874 R. S.; the court which sits for the trial of causes arising under the constitution and laws of the United States is held in Santa Fe County, and the juries selected to try cases in that court are selected from all the counties comprising the First Judicial District, but the juries in the trial of cases in the courts held in the counties are selected exclusively from the county, and properly speaking there are no United States courts in the territories, but there are *judicial district courts vested* with the power and jurisdiction to hear and determine causes which arise under the constitution and laws of the United States. The territorial courts vested with the power afore-

said were authorized to hold courts within their respective districts in the counties wherein, by the laws of the territory, courts had been or might be established for the purpose of hearing or determining all matters and causes, except those in which the *United States is a party.* The hearing of all matters and cases except those in which the *United States is a party* would seem to limit the jurisdiction of the United States courts to causes in which the *United States is a party,* and that in cases in which the United States is not a party the suit should be brought and prosecuted in the county district court.

While the Employers' Liability Act was created by Congress and has now been held to be valid so far as the territories are concerned, it is different from the Anti-Trust Law, the Meat Inspection Law, the Pure Food Law, the Interstate Commerce Laws and the Safety Appliance Law, because under the acts relative to the above subjects the power is given the United States to bring suits for the purpose of regulating the same, and they would be considered arising under the constitution and laws of the United States and in which the United States is a party.

The case of Hornbuckle vs. Toombs, 18 Wall. 648, clearly distinguishes between jurisdiction under Section 1868 and Section 1910, as follows:

> "It is true that the district courts of the territory are, by the Organic Act, in-

> vested with the same jurisdiction in all cases arising under the constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States; and a portion of each term directed to be appropriated to the trial of causes arising under such constitution and laws. Whether, when acting in this capacity, the said courts are to be governed by any other regulation affecting the Circuit and District courts of the United States, is not now the question. A large class of cases within the jurisdiction of the latter courts would not, under this clause, come in the territorial courts; namely, those in which the jurisdiction depends on the citizenship of the parties, cases arising under the constitution and laws of the United States would be composed mostly of revenue, admiralty, patent and bankruptcy cases, prosecution for crime against the United States and prosecution in suits for infractions of the law relating to civil rights under the fourteenth and fifteenth amendments. To avoid question and controversy as to the modes of proceeding in such cases where not already settled by law, perhaps additional legislation would be desirable."

In the opinion in the case of Clough vs. Curtis, 131 U. S. 361, 33 L. Ed. 945, the Court said:

> "It is contended however, that the provisions of each of the district courts in certain territories, including Idaho, 'shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States as is

invested in the Circuit and District Courts of the United States,' (R. S. U. S. Sec. 1910) confers original jurisdiction, in cases of that character, only upon the territorial district courts. But that section is not to be so interpreted. It does not forbid the Legislature from giving original jurisdiction to the district courts of the territory in cases other than those therein named. Accordingly, by the Revised Statutes of Idaho, the jurisdiction of the District Courts of the territory is extended to all civil actions for relief formerly given in courts of equity; in which the subject of litigation is not capable of pecuniary estimation; in which the subject of litigation is capable of such estimation, and which involves the title and possession of real estate or the legality of any tax, unjust assessment, poll or municipal fine; to all special proceedings; to the issuing of writs of mandate, review, prohibition, habeas corpus and all writs necessary to the exercise of its powers, and to the trial of indictments. Rev. Stat. Idaho, Sec. 3830. Nor does Section 1910 of the Revised Statutes of the United States forbid the Territorial legislature from conferring original jurisdiction upon the Supreme Court of the territory in cases named in section 3816 of the Revised Statutes of Idaho, although such cases may depend upon questions arising under the constitution or laws of the United States. If Congress had intended to confer upon the district courts of the territories named exclusive jurisdiction in the class of cases named in section 1910 it would have so declared in express terms."

Again in the case of McAllister vs. United States 141 U. S. 174, 35 L. Ed 693, the court says in the opinion:

> "In Good v. Martin, 95 U. S. 90, the language of the court speaking by Mr. Justice Clifford, was: 'Territorial courts are not courts of the United States within the meaning of the constitution as appears by all the authorities.' So in Raynolds vs. United States 98 U. S. 145, Chief Justice Waite speaking for the whole court said: 'By section 1910 of the Revised Statutes the district courts of the territories have the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the Circuit and District Courts of the United States; but this does not make them circuit and district courts of the United States. We have often so decided. They are courts of the territories, and vested for some purposes with the powers of the courts of the United States.' Again, in the City of Panama 101 U. S. 453: 'It is competent for Congress to make provision for the exercise of admiralty jurisdiction, either within or outside of the states; and in organizing territories Congress may establish tribunals for the exercise of such jurisdiction, or they may leave it to the legislature of the territory to create such tribunals. Courts of this kind, whether created by an Act of Congress or a territorial statute are not, in strictness, courts of the United States; or in other words, the jurisdiction with which they are invested is not a part of the judicial power defined

> by the third article of the constitution, but is conferred by Congress in the execution of the general powers which the legislative department possesses to make all the needful rules and regulations respecting the public territory and other public property."

The territorial judicial district courts exercising federal jurisdiction sit at one place in the district under a federal law and its business is kept separate from the business transacted in the district courts held in the county.

See also:

Thiede vs. Utah Ter. 159 *U. S.* 570.
Simms vs. Simms, 175 *U. S.* 162.
Ferris vs. Higley, 87 *U. S.* 375.
Benner vs. Porter, 9 *How.* 125.

In the case of Thiede v. Utah Territory, supra, the court said:

> "By section 1033, U. S. Revised Statutes the defendant in a capital case is entitled to have delivered to him, at least two entire days before the trial, a copy of the indictment and a list of the witnesses to be produced on the trial. Logan v. United States, 144 U. S. 263, 304. But this section applies to the circuit and district courts of the United States, and does not control the practice and procedure of the courts of Utah which are regulated by statutes of that territory. This question was fully considered in Horn-

> buckle v. Toombs, 85 U. S. 18 Wall. 648, and was held, overruling prior decisions, that the pleadings and procedure of the territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of the territorial assemblies and to the regulations that might be adopted by the courts themeslves."

The Supreme Court of the Territory of New Mexico in the case of Mining Company vs. District Court, 7 N. M. Rep. 486, in referring to the jurisdiction of the territorial United States courts said:

> "The district court has two distinct jurisdictions. As a territorial court, it administers the local law of the territorial government; as invested by act of Congress with jurisdiction to administer the law of the United States, it has all the authority of circuit and district courts of the United States. Even in Clinton v. Englebrecht 13 Wall., the distinction in the two jurisdictions is recognized. Again, in Hornbuckle v. Toombs, 18 Wall 656, the two distinct jurisdictions are recognized, and the fact that a portion of the term, where the jurisdictions are exercised by the same court at the same time, is set aside to United States business, under the act of Congress heretofore referred to, is there commented upon. If the jurisdiction of the district courts of this territory had not been separated by the legislature in accordance with the provisions of section 1874 of the

Revised Statutes where would the records of our courts go upon the admission of this territory as a state? To the state courts? Clearly not all the records, because the state courts would not have cognizance of the United States causes pending; and as clearly the federal cases would go, under section 529, Revised Statutes, to the district court of circuit court of the United States. Hunt v. Palao, 4 How. 589. 'When a territory becomes a state, the records of the courts of the territory are transferred to the new state courts and to the federal courts respectively, the judicial proceedings existing in the courts of the territory being continued by federal law in the respective state and federal courts.' Mr. Justice Field, in McAllister v. U. S. 141 U. S. 199. So we must agree that, while the two jurisdictions might have been exercised by identically the same courts and officers under the act of 1850, nevertheless these jurisdictions remained separate and distinct, and never became blended."

III.

EMPLOYERS' LIABILITY ACT, APPROVED JUNE 11TH, 1906, AND THE ACT OF APRIL 22ND, 1908.

This cause was brought under the 1906 act, but was tried under the saving clause in the Act of Congress entitled "An Act relating to the liability of common carriers by railroad to their em-

ployees in certain cases," approved April 22nd, 1908. Which provision reads as follows:

> "That nothing in this act shall be held to limit the duty or liability of common carriers or impair the rights of their employees under any other act or acts of congress or to affect the prosecution of any pending proceedings or right of action under the act of Congress, entitled, 'An Act relating to liability of common carriers in the District of Columbia and Territories and to common carriers engaged in commerce between the states and between the states and foreign nations to their employees,' approved June 11th, 1906."

This act did not give any life or validity to the act already declared void by the highest judicial tribunal. Congress did not re-enact the statute, but only provided that THIS ACT "Shall not affect any pending action." The act of 1906 was then void and of no effect, but it is contended that because in the decision holding the act void the Court said:

> "The legislative power of Congress over the District of Columbia and the Territories being plenary and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the Territories, if standing alone, could not be questioned."

But the Court said more, it held the act void as to that clause as well as any other part or section of it, saying:

> "Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested: that as, by causing the act to read 'any employe when engaged in interstate commerce,' we would restrict the act as to the District of Columbia and the Territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be adding to its provisions in order to save it in one aspect, and thereby destroy it in another; that is, to destroy in order to save and to save in order to destroy.
>
> The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is ambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is divisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save the rule applies only where it

is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy."

IV.

THE ACT OF 1908 WAS PROSPECTIVE AND NOT RETROACTIVE.

It seems that the lower court in overruling the demurrers interposed by the defendant to the complaint in this cause and also in overruling the motion for a new trial and the motion interposed by the defendant company at the close of plaintiff's case asking the Court to direct a verdict in favor of the defendant was based upon the proposition that the Act of April 22nd, 1908, had some retroactive effect or some saving clause so as to protect litigants who had cases pending based upon the 1906 act.

In the first place the act of 1908 does not make any such provision, and its effect was prospective and not retroactive.

A case directly in point was decided on September 5th, 1908, by the Circuit Court of Appeals, Winfree vs. Northern Pacific Railway Co., 164 Fed. 898, the syllabus is as follows:

"The provisions of Act April 22, 1908, c 149, 35 Stat. pt. 1, p. 65, relating to the liability of common carriers by a rail-

road to their employes, are prospective only in their operation, and the phase, "actions hereafter brought," as used in sec. 3 does not apply to an action by an employe for an injury received before the statute was enacted."

In the opinion the court says:

"To sustain the action under the statute the decision of Judge Hanford in Plummer vs. Northern Pacific Railway Co. (C. C.) 152 Fed. 206, has been cited but the holding in that case was that the Employers' Liability Act of June 11, 1906, (34 Stat. 232 c. 3073) created a new right and a new obligation,' by reason of which it could be construed to operate retroactively. In this view I fully concur. Certainly the explicit and sweeping provisions of the latter act are subject to no other construction. Section 1 creates a liability where none existed before, by providing for a recovery when injury results in whole or in part" from the negligence of any of the officers, agents or employes of such carrier. * * * Section 3 provides that contributory negligence shall not bar a recovery while section 4 is at least a radical modification of this rule prior to its adoption.

Here the plaintiff avowedly seeks to recover upon a state of facts which would not have entitled him to a judgment at the time the right accrued. This would deprive the defendant of something substantial, and confer upon the plaintiff a benefit which was not existent and could not have been in the contemplation of the

> parties when the relation of employer and employe was entered into. Since it cannot be supposed that Congress intended to disturb existing rights, it must be held that the statute was intended to be prospective in its operation and that the language of section 3 'that in all actions hereafter brought' was intended to refer to causes of action arising after the passage of the act."

Thornton on the Employers' Liability and Safety Appliance Acts, Section 109b, states the doctrine and cites cases as follows:

> "The statute in question (referring to the act of 1908) is prospective and not retroactive. It does not give a remedy for an injury sustained before its enactment."

Citing:

Osborn vs. Detroit, 32 *Fed.* 36.
Eastman vs. County of Clackamas, id. 24.
Humboldt etc. Co. v. Christopherson, 73 *Fed.* 239.
Wright vs. Southern Ry. Co., 80 *Fed.* 260.
Plummer vs. Northern Pac. Ry. 152 *Fed* 206.
Hall vs. Chicago etc. R. Co. 149 *Fed.* 564.

The last case above cited refers to the Act of Congress approved June 11, 1906, and uses the following language:

> "Employers' Liability Act * * * regulating the liability of interstate carriers for injuries to employes, etc., was prospective only in operation and did not apply to causes of action existing at the time of its adoption."

The Supreme Court of the Territory of New Mexico seems to have relied almost entirely upon the decision rendered in the case of the El Paso and Northeastern Ry. Co. v. Gutierrez reported in 215 U. S. 87 (54 L. Ed. 106) which merely holds that the Employers' Liability Act so far as it applied to the District of Columbia and the Territories is valid. The above case undoubtedly settled the question that the act of June 11th, 1906, is constitutional and valid as to Territories but the decision rendered in that case does not decide that even though Congress had the right to pass such a law by virtue of its plenary powers over the Territories that the Judicial District Courts of the Territories had jurisdiction over the parties or the subject matter, and did not add to or change the jurisdiction of the "Judicial District Courts of the Territory" and while the court said that the Employers' Liability Act controlled, it meant merely that any common carrier engaged in trade or commerce in any of the Territories of the United States should be liable for the death or injury of any of its employees which may result from the negligence of its officers, agents or employees and that the Territorial Act must fall as being con-

trolled by the Employers' Liability Act.

The effect of the decision in the above case was to say that the Territorial Act requiring certain preliminary things to be done by the injured party before he could maintain a suit had been superceded by said Act of Congress and that common carriers in the Territories should be responsible to answer unto damages for the negligence of any of its officers, agents or employees.

The United States could never become a party in a suit brought by an employee to recover for the injury received under the Employers' Liability Act, nor could it bring such a suit independently against a common carrier for any injury sustained by an employee. The jurisdiction of the courts of the Territory remained just the same as it did before the passage of the Employers' Liability Act, and the action should have been brought in the District Court of the County or the forum fixed by the Territorial Legislature, and the United States not being a party the District Court of the First Judicial District had no jurisdiction over either the parties or the subject matter and sections 900 and 901 Compiled Laws of New Mexico 1897 and the Kearny Code hereinbefore referred to governed and controlled.

Upon the trial of such an action the district Court for the county would have been governed by the provisions of the Employers' Liability Act as to procedure and the instructions to the jury as to the liability of the Common Carrier for the

negligence of its officers, agents and employees. The Act of Congress would have controlled as against any Territorial statutes limiting or prescribing any preliminary acts to be done before bringing or commencing suit.

We submit that the decision of the lower court affirmed by the Supreme Court of the Territory holding that the First Judicial District Court of the Territory of New Mexico had jurisdiction over either the parties or the subject matter should be reversed.

All of which is respectfully submitted,

E. W. Dobson,
Attorney for Plaintiff in Error.

BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 230

FILED
MAR 8 1915
JAMES D. MAHER
CLERK

THE SANTA FE CENTRAL RAILWAY COMPANY AND W. S. HOPEWELL AND THOMAS P. GABLE, ITS SURETIES,

Plaintiffs in Error,

vs.

HARRY SLOCUM FRIDAY, BY JOHN H. FRIDAY, HIS NEXT FRIEND,

Defendant in Error.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

T. B. Catron,
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Santa Fe, N. M.

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BRIEF FOR DEFENDANT IN ERROR.

The plaintiffs in error assert in their brief that the District Court of the First Judicial District of the Territory of New Mexico that tried this case, had no jurisdiction over either the parties, or the subject matter. They contend first that the suit should have been brought in a County District Court, and not in the Judicial District Court of the Territory, and second, that the suit having been brought under the Employers Liability Act of Congress, approved June 11, 1906, before that act was declared by the Supreme Court of the United States unconstitutional, except as to Territories and the District of Columbia, could not be prosecuted as provided by the saving clause of "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908.

Neither of these objections was raised in the trial court by answer or demurrer but they were raised on a motion for rehearing in the Supreme Court of the Territory, after that Court had affirmed the judgment of the court below.

ACTION WAS INSTITUTED IN THE PROPER COURT.

This suit was brought under the Employers Liability Act of Congress approved June 11, 1906, and as a pending case was prosecuted to a final judgment after the passage of the act of Congress approved April 22, 1908.

Suit was brought in the First Judicial District Court, or in other words, in the Territorial or Federal Court as distinguished from the County District Court, because the act under which it was brought was a Federal act.

Our contention is that that Court was the proper Court in which to bring the suit under Section 1910 of the Revised Statutes of the United States and other United States Statutes and decisions thereunder.

Section 1910 of the Revised Statutes is as follows:

> "Each of the district courts in the territories mentioned in the preceding section shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts o fthe United States; and the first six days of every term of the respective district courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals in all such cases may be had to the Supreme Court of each territory, as in other cases."

In Section 10 of the Organic Act of the Territory of New Mexico we find the following provision:

> " * * * and each of the said District Courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States."

It is apparent that the District Courts of the Territories,

referred to in the above sections are the Federal or Territorial District Courts and not the County District Courts held under the local laws of the Territories.

In the District or Federal Courts of the Territories is vested the same jurisdiction, as is vested in the Circuit and District Courts of the United States "in all cases arising under the Constitution and laws of the United States."

Reynolds v. U. S., 98 *U. S.* 154;

Insurance Co. v. Canter, 1 *Pet.* 511;

Benners v. Porter, 9 *How.* 235;

Clinton v. Englebucht, 13 *Wall.* 434;

N. P. R. R. Co. v. Carland, 3 *Pac. Rep.* (1884) 134;

Hughes v. N. P. R. R. Co., 18 *Fed. Rep.* 106;

Murphy v. Murphy, 85 *N. W.* 806;

1 *Wash. Terr. Reports* 362;

Chouteau v. Rice, 1 *Minn.* 192;

U. S. v. Jones, 5 *Utah* 556;

Johnson v. U. S., 6 *Utah* 403;

U. S. v. Haskers, 3 *Sawyer U. S.* 262;

U. S. v. Pridgeon, 153 *U. S.* 48;

Berry v. United States, 3 *Colo.* 186;

Clough v. Curtis, 131 *U. S.* 361;

McAllister v. United States, 141 *U. S.* 174.

In Reynolds v. United States, 98 U. S. at page 154, the Supreme Court in speaking of the District Courts of the Territories say, "They are Courts of the Territories created for some purposes with the powers of the Courts of the United States."

In Northern Pacific R. R. Co. v. Carland, 3 Pacific Reporter at page 138, the Territorial Supreme Court of Montana said, "If this suit could have been properly commenced in the Circuit Court of the United States, then it is properly com-

menced in a court having like jurisdiction to that of the Circuit Court, and such is the jurisdiction of our Territorial Courts when sitting to hear and determine cases arising under the Constitution and laws of the United States."

In Hughes v. N. P. R. R. Co., 18 Federal Reporter 106, at page 110, the Circuit Court of the United States said, "A controversy which turns upon the existence, effect or operation of an act of Congress, arises under such act and a suit brought to determine the same is a case arising under such act within the meaning of the statute."

In Murphy v. Murphy, 25 N. W. Rep. at page 806, the Territorial Supreme Court of Dakota speaking of Territorial Courts said, "By Section 1910 their jurisdiction is defined as being the same as that vested in the Circuit and District Courts of the United States in all cases arising under the Constitution and laws of the United States."

In U. S. v. Pridgeon, 153 U. S. 48, the court says, "The courts created for the Territory of Oklahoma are clearly dual in their nature. They sit as Territorial courts to administer the laws of the Territory, and the courts of the United States to administer the laws of the United States."

The plaintiffs in error in their brief quote Section 1874 of the Revised Statutes of the United States and contend thereunder that authority was given the legislature of the Territory of New Mexico to create courts to be held in the various counties and to authorize such courts when created, to exercise all the jurisdiction formerly exercised by the Federal or Territorial Courts, with the single exception of causes in which the United States is interested as a party. They refer to no decision of any court to sustain their position that no cause can be maintained in the Federal or Judicial District Court of the Territory unless the United States is a party. If their contention is true that no suit can be brought in the Federal or Judicial District Court of the Territory unless the United States is a party, or is interested in the result of the suit, then what becomes of Section 1910 of the Revised Statutes of the United States, and Section 10 of the Organic Act of the Territory which provide that Federal or District Courts of the Territory shall have and exercise jurisdiction in all cases arising under the Constitution and laws of the United States? Section 1874 of the Revised

Statutes will not bear the interpretation that the plaintiffs in error seek to place upon it. We here quote the portion of the section under consideration.

> "Section 1874. The judges of the Supreme Court of each Territory are authorized to hold court within their respective districts, in the counties wherein, by the Territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes, except those in which the United States is a party; * * * "

This act was passed in 1858 and applies to all the Territories.

Now what are the courts of the counties established by the legislature for? To try causes arising under the Constitution and laws of the United States? Certainly not, but to try those arising under the laws of the Territory. The exception of the United States from the jurisdiction of these county district courts does not mean that the Federal, or Judicial District Courts are denied jurisdiction as to causes arising under the Constitution and laws of the United States as provided in Section 1910 of the Revised Statutes of the United States, and Section 10 of the Organic Act of this Territory, and no court so far as we know has ever taken that view of it. On the contrary in the case of Murphy v. Murphy, supra, the Territorial Supreme Court of Dakota, in commenting on the provisions of Section 1874 of the Revised Statutes of the United States, says, "It has only given them (County District Courts) the authority to hear and determine all matters and causes arising under Territorial laws."

So held the Supreme Court of the Territory of New Mexico in the case of Lincoln Lucky Mining Co. v. District Court, 7 N. M. at page 501, the court says, "Clearly, the intention of Congress evinced by the passage of Section 1874, Revised Statutes, was to provide for the creation of courts in the Territories which should have jurisdiction in causes arising under the laws of the Territory as we have said before, and, these courts having been put in motion, by necessary implication the jurisdiction to try such causes was taken from the judicial district courts and conferred upon the 'district courts for the counties.'" There is no intimation in this decision

that the district courts for the counties could try anything except causes arising under the laws of the Territory.

Section 1874 of the Revised Statutes was framed for the purposes of relieving the Federal, or Judicial District Courts from the trial of causes arising under the laws of the Territory but it was never intended by that section to deprive the Federal or Judicial District Courts of jurisdiction in any cause arising under the Constitution or laws of the United States. It simply takes away from the Federal, or Judicial Courts jurisdiction of Territorial causes arising under Territorial laws and goes no further.

There are a number of cases upholding the jurisdiction of the Federal, or Judicial District Courts of the Territories to try causes arising under the laws of the United States where the United States is not a party, both before and since the passage of Section 1874 of the Revised Statutes of the United States. We give the following as a few of such cases:

The American Ins. Co. etc. v. Canter, 1 *Peters at* 511.

This was a case that involved the question as to whether a decree of the Territorial Court of Florida was a nullity, where the court ordered a sale of 356 bales of cotton; the jurisdiction of the court was sustained by reason of an act of Congress of 1883 in which it was provided, in the 8th section of the act, "That such of the said Superior Courts shall have and exercise the same jurisdiction within its limits in all cases arising under the laws and constitution of the United States. etc." The United States was not a party.

Benner, et al. v. Porter, 9 Howard 265. This was also a Florida case and the same principle was sustained by the Supreme Court of the United States. The United States was not a party.

The S. S. City of Panama v. Phelps, 101 U. S. 453. In this case a suit was brought for personal injuries in the Federal, or Judicial District Court of the Territory of Washington under the Admirality laws of the United States. The United States was not a party and had no interest in the suit. The Supreme Court of the United States said in this case, "Express power is also given to the District Courts of the Territory to have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United

States." Again this same court says, "Instances where such jurisdiction has been exercised by the Territorial District Courts under such acts are numerous and they extend from the time when our territorial system was organized to the present time (1879) and the power has always been exercised without challenge from any quarter and without the least doubt of the constitutional or legal authority." The court here cites the following cases:

The Cutler v. The Columbia, 1 *Oregon* 101;

Price v. Frankel, 1 *Wash. Terr.* 43;

Meigs v. The Northerner, 1 *Wash. Terr.* 91;

Griwn v. Nichols, 1 *Wash. Terr.* 375.

In not a single one of these cases was the United States a party, but the jurisdiction of the Federal, or Judicial District Courts was sustained because such jurisdiction is vested in them under Section 1910 of the Revised Statutes of the United States.

In the case of the N. P. R. R. Co. v. Carland, 3 Pac. Rep. at page 135, the United States was not a party and had no interest in the suit. This was an action by the railroad company against Carland, the County Treasurer, to enjoin the collectio nof a tax assessed against twenty miles of railroad. The action was commenced in the District Court of the First Judicial District of the Territory of Montana, sitting to hear and determine causes arising under the Constitution and laws of the United States. The suit was brought under an act of Congress of July 4, 1864, entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern Route." It was clearly a suit affecting no interest of the United States. The question of jurisdiction was raised in the case as it is raised in this case. To the question, "was the action commenced in the proper court?" the Supreme Court of the Territory of Montana said, "Our District Courts sitting to hear and determine causes arising under the Constitution and laws of the United States have the same jurisdiction as the Circuit and District Courts of the United States. Our Organic Act provides (Section 9) "and each of said

District Courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the District and Circuit Courts of the United States and the first six days of each term of said courts, or so much thereof as may be necessary, shall be appropriated to the trial of causes arising under the said Constitution and laws." Then the court adds, "If this suit would have been properly commenced in the Circuit Court of the United States, then it is properly commenced in a court having like jurisdiction to that of the Circuit Court and such is the jurisdiction of our Territorial District Courts when sitting to hear and determine causes arising under the Constitution and laws of the United States."

To which we supplement this remark—it is immaterial who the parties are, whether both the plaintiff and defendants are individuals, or whether one or both are corporations, or whether the United States is a party, the rule is the same so long as the suit arises under an act of Congress.

The plaintiff in error quotes Sections 880, 1040, 900, 901, 905 and 2950, the Compiled Laws of 1897 of this Territory relating to the jurisdiction and practice of the County District Courts under the laws of this Territory. We do not consider that these sections have any application to the case at bar. It has already been seen from the decisions of various courts, including the Supreme Court of New Mexico that these County District Courts are constituted to hear and determine causes arising under the laws of the Territory. It is not doubted that Congress could have conferred jurisdiction on these County District Courts to hear and determine causes arising under the laws of Congress, but the legislature of the Territory could not do so. The Territorial legislature has no power to restrain or control the Judicial District Court or Federal Court in the exercise of their power and jurisdiction in any case arising under the laws of the United States.

U. S. v. Jones, 5 *Utah* 553.

Plaintiffs in error cite the case of Schofield v. Stephens, 7 N. M. 819. The question involved in that case was whether or not the District Court of the Fifth Judicial District had jurisdiction to hear and determine a cause brought

by a receiver of a national bank and, it was decided that a national bank is created by virtue of the laws of the United States and that a receiver of a national bank is an officer of the United States and therefore that the court had jurisdiction. This case does not support the theory that the United States must be a party before a Judicial District Court of the Territory can assume jurisdiction.

Thornton in his wor kentitled, "The Employers' Liability and Safety Appliance Act," at page 132, says, Since the liability is created by a Federal statute, and an injured employee bases his right of action thereon, there is no serious doubt but what he may bring his action in a Federal Court regardless of the question of diverse citizenship. Argument on that question is not necessary to establish it."

THE PROCEEDINGS IN THE TRIAL COURT WERE REGULAR AND THE FINAL JUDGMENT THEREUNDER IS VALID.

The Act of April 22, 1908, provides:

> "That nothing in this act shall be held to limit the duty or liability of common carriers or impair the rights of their employees under any other act or acts of congress or to affect the prosecution of any pending proceedings or right of action under the act of congress ,entitled, 'An Act relating to liability of common carriers in the District of Columbia and Territories and to common carriers engaged in commerce between the states and between the states and foreign nations to their employees,' approved June 11th, 1906."

It is true that this clause could not give validity to the Act of 1906 wherein that act was declared unconstitutional by the court, but it preserves to the litigant the right to prosecute an action pending when the law was passed.

This court in holding the Act of 1906 void in the States did not hold that an action pending in a territorial court could not be retained on the docket of that court for further prosecution under a subsequent act.

It is contended by the plaintiffs in error, that the act of 1908 is prospective and not retroactive and they cite the case

of Winfree vs. Northern Pacific Railway Company, 164 Fed. Rep. 698 in support of this contention. That case and the one at bar are not parallel cases. The case of Winfree vs. Northern Pacific Railway Company was instituted under the Act of 1908 for injuries complained of before the statute was passed. It was not a case pending under the act of 1906 in a territorial court, nor did it come within the saving clause in Section 8 of the Act of 1908.

But we contend that the proceedings of the trial court below, were regular, and the judgment of that court was a valid judgment regardless of the saving clause contained in the act of 1908. The Act of 1906 was alive and valid in the Territory of New Mexico where this cause was instituted, and was so held in the case of the El Paso & Northeastern Railway Company vs. Gutierrez, 215 U. S. 87.

No inchoate rights arising under the Act of 1906 in the Territory of New Mexico have been destroyed by any subsequent legislation.

We, therefore, submit that the judgment of the court below should be affirmed, and that damages at the rate of ten per cent. (10%) in addition to interest, should be awarded the defendant in error upon said judgment, as it is apparent from the record that the appeal herein was sued out merely for delay.

Respectfully submitted,

T. B. CATRON,

GEORGE W. PRICHARD,

Attorneys for Defendant in Error.

SANTA FE CENTRAL RAILWAY COMPANY *v.* FRIDAY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 230. Submitted March 5, 1914.—Decided March 23, 1914.

A statute of a Territory cannot withdraw from the courts established by the United States authority expressly conferred upon them by Congress by the Organic Act and other statutes. *The City of Panama*, 101 U. S. 453.

The District Court of the United States for New Mexico has jurisdiction of a case arising under the Employers' Liability Act of 1906.

This court will not decide against the local understanding as expressed by the decisions of the Supreme Court of a Territory in construing a jurisdictional statute affecting a matter of local concern unless those decisions are clearly wrong. *Phœnix Ry. Co.* v. *Landis*, 231 U. S. 578.

16 New Mex. 434, affirmed.

THE facts, which involve the jurisdiction of the courts of a Territory of the United States over actions brought under the Employers' Liability Act of 1906, are stated in the opinion.

Mr. E. W. Dobson for plaintiffs in error:

The Organic Act, the acts of Congress and the legislative acts must all be considered and construed in determining the question. See § 10 Organic Act of September 30, 1850; § 880, Comp. Laws New Mex. 1897, passed January 3, 1852; § 1040 *Id.*, passed July 12, 1851; § 900 *Id.*, passed September 22, 1846; § 901 *Id.*, passed January 26, 1859; § 904 *Id.*; § 905 *Id.*, passed January 20, 1859; § 2950 *Id.*, passed January 7, 1876; Kearny Code, September 22, 1846, § 18; §§ 1874, 1910, Rev. Stats. U. S., passed June 14, 1858.

There are, therefore, provisions for District Courts of

the Territory and District Courts for each of the various counties and a territorial law giving the District Courts in the counties exclusive original jurisdiction in all civil actions and fixing the forum where they must be brought or commenced.

The courts in the various counties having been established by territorial legislation previous to the enactment of § 1874, Rev. Stat., or which were by law established subsequent to that time, in the counties of the Territory for the trial of all civil causes, except those in which the United States was a party, the jurisdiction of the so-called United States District Courts existing previous to the enactment of said § 1874, vested in and passed to the District Courts of the various counties, and out of the so-called United States courts, except in causes where the United States is a party. *Schofield* v. *Stephens*, 7 New Mex. 619.

Congress did not define the jurisdiction of the District Courts except as Federal courts, but as courts of the Territory they have such jurisdiction as the territorial legislature might prescribe. The territorial legislature provided that the District Courts should have original jurisdiction in all cases, civil and criminal, in which the jurisdiction is not especially delegated to some other court.

While the Employers' Liability Act was created by Congress and has now been held to be valid so far as the Territories are concerned, it is different from the Anti-Trust Law, the Meat Inspection Law, the Pure Food Law, the Interstate Commerce Laws and the Safety Appliance Law, because under the acts relative to the above subjects the power is given the United States to bring suits for the purpose of regulating the same, and they would be considered as arising under the Constitution and laws of the United States and in which the United States is a party.

See *Hornbuckle* v. *Toombs*, 18 Wall. 648, for difference between jurisdiction under § 1868 and § 1910; *Clough* v.

Curtis, 131 U. S. 361; *McAllister* v. *United States*, 141 U. S. 174.

The territorial judicial District Courts exercising Federal jurisdiction sit at one place in the district under a Federal law and their business is kept separate from the business transacted in the District Courts held in the county. *Thiede* v. *Utah Territory*, 159 U. S. 570; *Simms* v. *Simms*, 175 U. S. 162; *Ferris* v. *Higley*, 20 Wall. 375; *Benner* v. *Porter*, 9 How. 125; *Mining Co.* v. *District Court*, 7 New Mex. 486.

As to the Employers' Liability Act, approved June 11, 1906, and the act of April 22, 1908, the latter did not give any life or validity to the act already declared void by the highest judicial tribunal. Congress did not reënact the statute, but only provided that this act "shall not affect any pending action." The act of 1906 was then void and of no effect.

The act of 1908 was prospective and not retroactive. *Winfree* v. *Nor. Pac. Ry. Co.*, 164 Fed. Rep. 898; Thornton on Employers' Liability, § 109b; *Osborn* v. *Detroit*, 32 Fed. Rep. 36; *Eastman* v. *County of Clackamas*, 32 Fed. Rep. 24; *Humboldt Co.* v. *Christopherson*, 73 Fed. Rep. 239; *Wright* v. *Southern Ry. Co.*, 80 Fed. Rep. 260; *Plummer* v. *Northern Pac. Ry.*, 152 Fed. Rep. 206; *Hall* v. *Chicago &c. Ry. Co.*, 149 Fed. Rep. 564. *El Paso &c. Ry. Co.* v. *Gutierrez*, 215 U. S. 87, distinguished as merely holding that the Employers' Liability Act so far as it applied to the District of Columbia and the Territories is valid.

Mr. T. B. Catron, with whom *Mr. George W. Prichard* was on the brief, for defendant in error:

This suit was brought under the Employers' Liability Act of Congress approved June 11, 1906, and as a pending case was prosecuted to a final judgment after the passage of the act of Congress approved April 22, 1908.

Suit was brought in the First Judicial District Court, or in other words, in the territorial or Federal court as distinguished from the County District Court, because the act under which it was brought was a Federal act.

That court was the proper court in which to bring the suit under § 1910, Rev. Stat., and other United States statutes and decisions thereunder.

In the District or Federal Courts of the Territories is vested the same jurisdiction as is vested in the Circuit and District Courts of the United States "in all cases arising under the Constitution and laws of the United States." *Reynolds* v. *United States*, 98 U. S. 154; *Insurance Co.* v. *Canter*, 1 Pet. 511; *Benners* v. *Porter*, 9 How. 235; *Clinton* v. *Englebucht*, 13 Wall. 434; *N. P. R. R. Co.* v. *Carland*, 3 Pac. Rep. 134; *Hughes* v. *N. P. R. R. Co.*, 18 Fed. Rep. 106; *Murphy* v. *Murphy*, 85 N. W. Rep. 806; *Chouteau* v. *Rice*, 1 Minnesota, 192; *United States* v. *Jones*, 5 Utah, 556; *Johnson* v. *United States*, 6 Utah, 403; *United States* v. *Haskers*, 3 Sawyer (U. S.), 262; *United States* v. *Pridgeon*, 153 U. S. 48; *Berry* v. *United States*, 3 Colorado, 186; *Clough* v. *Curtis*, 131 U. S. 361; *McAllister* v. *United States*, 141 U. S. 174.

For cases upholding the jurisdiction of the Federal, or Judicial District Courts of the Territories, to try causes arising under the laws of the United States where the United States is not a party, both before and since the passage of § 1874, Rev. Stat., see *American Ins. Co.* v. *Canter*, 1 Pet. 511; *Benner* v. *Porter*, 9 How. 265; *City of Panama* v. *Phelps*, 101 U. S. 453.

For instances in which such jurisdiction has been exercised by the territorial District Courts under such acts, see *The Cutler* v. *The Columbia*, 1 Oregon, 101; *Price* v. *Frankel*, 1 Wash. Terr. 43; *Meigs* v. *The Northerner*, 1 Wash. Terr. 91; *Griwn* v. *Nichols*, 1 Wash. Terr. 375.

It is immaterial who the parties are, whether both the plaintiff and defendants are individuals, or whether one

or both are corporations, or whether the United States is a party, the rule is the same so long as the suit arises under an act of Congress.

Sections 880, 900, 901, 905, 1040 and 2950, Compiled Laws of 1897 of this Territory have no application to the case at bar. The territorial legislature has no power to restrain or control the Judicial District Court or Federal court in the exercise of their power and jurisdiction in any case arising under the laws of the United States. *United States* v. *Jones*, 5 Utah, 553.

Schofield v. *Stephens*, 7 New Mex. 819, distinguished, and see Thornton on Employers' Liability, p. 132.

The proceedings in the trial court were regular and the final judgment thereunder is valid. *Winfree* v. *Nor. Pac. Ry. Co.*, 164 Fed. Rep. 698, distinguished, and see *El Paso &c. Ry. Co.* v. *Gutierrez*, 215 U. S. 87.

No inchoate rights arising under the act of 1906 in the Territory of New Mexico have been destroyed by any subsequent legislation.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries brought by the defendant in error against the Railway Company under the act of June 11, 1906, c. 3073, 34 Stat. 232, held valid for the Territories in *El Paso & Northeastern Ry. Co.* v. *Gutierrez*, 215 U. S. 87. The plaintiff got a verdict and judgment which the Supreme Court of the Territory affirmed. 16 New Mex. 434.

The only argument addressed to us is an attack upon the jurisdiction of the court that tried the case. That court was the District Court sitting for the trial of causes arising under the Constitution and laws of the United States in the First Judicial District in the Territory of New Mexico. The Organic Act of September 9, 1850, c. 49, 9 Stat. 446, provided in § 10 for three judicial districts, and for a District Court to be held in each by a Jus-

tice of the Supreme Court as should be prescribed by law. It further enacted that the jurisdiction of the several courts therein provided for "shall be as limited by law"; that "each of the said District Courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States;" and that the first six days of every term or so much of them as necessary "shall be appropriated to the trial of causes arising under the said Constitution and laws." See also Rev. Stat., § 1910. The court where the trial was held was one of these District Courts provided for by the Organic Act and the case was one arising under the laws of the United States.

But it is said that the jurisdiction of these courts was to be 'as limited by law,' that that means by territorial legislation, and that a territorial statute provided for the holding of District Courts in the counties, and enacted that the District Courts in the counties should have "exclusive original jurisdiction in all civil cases which shall not be cognizable before probate judges and justices of the peace." Compiled Laws, 1897, § 900. By a later territorial act the District Courts in the various counties were given 'jurisdiction in all civil causes in said counties which according to law belong to the District Courts,' *id.*, § 901. And this was in pursuance not only of the Organic Act but of another act of Congress of June 14, 1858, c. 166, 11 Stat. 366, afterwards Rev. Stat., § 1874, by which the judges of the Supreme Court were "authorized to hold court within their respective districts, in the counties wherein, by the laws of the Territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes, except those in which the United States is a party." Thus, it is argued, exclusive jurisdiction of cases like the present was transferred to the County District Courts.

But it has been held for many years that the purpose and effect of these statutes was to give the judges of the Supreme Court sitting in the County District Courts authority to hear cases arising under territorial laws, and to make the jurisdiction over such cases exclusive in those courts. *Lincoln-Lucky & Lee Mining Co.* v. *District Court*, 7 New Mex. 486, 499–501. *Murphy* v. *Murphy*, 25 N. W. Rep. 806. The statutes, we believe, have not been understood to attempt to withdraw from the courts of the larger districts the authority expressly conferred upon them by the Revised Statutes and the Organic Act, a thing that of course territorial statutes could not do. See *The City of Panama*, 101 U. S. 453. We should not decide against the local understanding of a matter of purely local concern unless we thought it clearly wrong, instead of thinking it, as we do, plainly right. *Phœnix Ry. Co.* v. *Landis*, 231 U. S. 578, 579.

Judgment affirmed.